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BENTHAM'S  
THEORY OF LEGISLATION

BEING  
PRINCIPES DE LÉGISLATION  
AND  
TRAITÉS DE LÉGISLATION, CIVILE ET  
PÉNALE

TRANSLATED AND EDITED FROM THE FRENCH OF  
ÉTIENNE DUMONT

BY  
CHARLES MILNER ATKINSON

VOL. I.  
PRINCIPLES OF LEGISLATION  
PRINCIPLES OF THE CIVIL CODE

HUMPHREY MILFORD  
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## INTRODUCTION.

BENTHAM did not himself write any treatise, nor was he responsible for any publication, that bore the name 'Theory of Legislation.' The title came into vogue many years after Bentham's death, and was applied to a translation of portions of a book written in the French tongue by one Dumont, a Swiss. This book was published, in 1802, at Paris, in three volumes, and was entitled *Traité de Législation Civile et Pénale, Précédés de Principes Généraux de Législation, et d'une Vue d'un Corps complet de Droit : terminés par un Essai sur l'Influence des Temps et des Lieux relativement aux Lois. Par Mr. Jérémie Bentham, Jurisconsulte Anglois. Publiés en François par Ét. Dumont, de Genève, d'après les Manuscrits confiés par l'Auteur.*

The publication came about in this wise: Towards the close of the eighteenth century, Étienne Dumont (1759-1829), Bentham's Swiss expositor, had long been on terms of the closest friendship with Samuel Romilly, whom he had met at Geneva in 1781. Dumont held office, for a short time, as pastor of the Protestant Church at St. Petersburg, and afterwards came to reside in London, where he was introduced by Romilly to Lord Lansdowne, who had hoped to secure his services as tutor for his younger son, Lord Henry Petty. It was on his return from Russia in 1788 that Bentham, through his intimate and excellent friends Romilly and Lansdowne, made the acquaintance of the man who was destined, in Macaulay's phrase, to become to him 'what Aaron was to Moses, the expositor of great truths, which would else have perished for want of

a voice to utter them with distinctness.' During the autumn of 1788, Bentham himself handed to Dumont several of his manuscripts on legislation. Shortly afterwards Dumont left London for Paris, with a view to securing the complete restoration of Genevese liberty; and many other manuscripts were sent, through Romilly, for his perusal. Dumont communicated extracts to the *Courrier de Provence*, and offered to superintend the publication of the manuscripts as a whole; but it was not until 1802 that the *Traité de Législation* appeared in book-form.

More than sixty years later there was published, in one volume, a translation of certain selected portions of Dumont's work, under the style of Bentham's *Theory of Legislation*, the title by which the volume is still known. It comprises an English version of *Principes de Législation* (vol. i., pp. 1-140); *Principes du Code Civil* (vol. ii., pp. 1-236); *Principes du Code Pénal* (vol. ii., pp. 239-434; vol. iii., pp. 1-199). The Penal Code had been subdivided by Dumont into four parts: *Des Délits*; *Remèdes Politiques contre le Mal des Délits*; *Des Peines*; *Des Moyens Indirects de prévenir les Délits*.

In Sir John Bowring's edition of Bentham's works, which was issued at intervals between 1838 and 1843, there had already appeared translations of most of those portions of the *Traité de Législation* which were extracted to form the volume known as the *Theory of Legislation*—i.e., *Principes du Code Civil* (Bowring, vol. i., pp. 297-358); *Remèdes Politiques contre le Mal des Délits* (Bowring, vol. i., pp. 367-388); *Des Moyens Indirects de prévenir les Délits* (Bowring, vol. i., pp. 533-580). *Des Délits* consists, in the main, of adaptations from the *Introduction to the Principles of Morals and Legislation* (Bowring, vol. i., pp. 1-154); while chapters xiii. and xiv. of the *Introduction*, as they appear in Bowring's edition, are themselves taken direct from the work of Dumont (vol. ii., pp. 259-261; pp. 268-284; vol. i., pp. 89-97).

In the present edition the text of Dumont has been translated afresh; but the title *Theory of Legislation*, so long recognized, has been retained.

‘The plan,’ wrote Bentham, in 1795, to the Duc de Liancourt, ‘was that Dumont should take my half-finished manuscripts as he found them—half English, half English-French—and make what he could of them in Genevan French, without giving me any further trouble about the matter. Instead of that, the lazy rogue comes to me with everything that he writes, and teases me to fill up every gap he has observed.’

In editing Bentham’s writings, Dumont simplified the text, softened and corrected the style, and ‘toned down’ passages relating to religious topics. Sometimes he merged several manuscripts into one, and reconciled any discrepant views; though M. Élie Halévy, who has devoted much research to the subject, declares that Dumont exaggerates the importance of the work accomplished by him in this regard: *Après examen des manuscrits, nous osons dire que Dumont exagère l’importance de ce travail de fusion (La Jeunesse de Bentham, p. 372)*. We may, by way of illustration of the methods employed, give, in parallel passages, Bentham’s original manuscript, dealing with the account to be taken of the ‘consequential’ evil of an offence, and the version of his expositor:

*Bentham.*—D’un délit dont résulte un mal conséquentiel, le mal total sera plus grand que s’il n’en résulteroit point de tel mal. Si, en conséquence d’un emprisonnement qu’il a subi ou d’une blessure qu’il a reçue, un homme a manqué, par exemple, une place qu’on lui destinoit, un mariage qu’il recherchoit, ou un gain que lui préparoit son commerce, il n’est pas besoin de dire que ces pertes ajoutées à l’emprisonnement ou à la blessure font une masse de mal plus considérable que n’en feroit l’emprisonnement ou la blessure même.

*Dumont.*—Le mal total d’un délit est plus grand s’il en résulte un mal conséquentiel, portant sur le même individu. Si par les suites d’un emprisonnement ou d’une blessure, vous avez manqué une place, un mariage, une affaire lucrative, il est clair que ces pertes sont une addition à la masse du mal primitif (vol. ii., p. 254).



In these circumstances, little direct responsibility can attach to Bentham for imperfections in the French version of his writings; still less can he be held responsible in respect of any defects in the style or diction of the English translations. Mr. Hildreth, who translated the parts of the *Traité*s that constitute the *Theory of Legislation*, asserts that Bentham 'was not skilful in the art of composition; he did not possess the gift of eloquence.' So, too, Hazlitt said: 'He (Bentham) writes a language of his own that *darkens knowledge*. His works have been translated into French: they ought to be translated into English.' No doubt, in later life, Bentham's use of language was so peculiar, and the construction of his sentences so intricate, as to give rise to much obscurity, quite apart from any difficulty that was caused by his strangely invented phraseology—his 'new lingo,' as he called it. But in the days when he produced the greater part of the manuscripts entrusted to Dumont his style was pure and nervous, and his writings were marked by singular care, precision, and polish. 'English literature,' wrote Sir Samuel Romilly, 'hardly affords any specimens of a more correct, concise, and perspicuous style than that of the *Fragment on Government*.' The *Fragment* was published in 1776, when Bentham was in his twenty-ninth year. John Stuart Mill was evidently in full agreement with Romilly, for he, too, declared that 'a Benthamiana might be made of passages worthy of Addison or Goldsmith.'

In 1772, while yet a very young man, Bentham was already collecting materials for a treatise designed to assail the 'lawless science of the law,' under the title of *Critical Elements of Jurisprudence*. Many years afterwards he used to say that, being set to read 'old trash' of the seventeenth century, he looked up to the huge mountain of law in despair: the 'Dæmon of Chicane' had already appeared in all his hideousness, and war had been declared against him.



In 1777 the Société Économique of Berne offered a prize of fifty louis for the best plan of a code of Criminal Law; a further sum of a like amount was added to the prize by Voltaire and Thomas Hollis. When this offer came to the knowledge of Bentham, he resolved to compete. So early as 1775 he had prepared the manuscripts from which Dumont, in 1811, compiled the *Théorie des Peines*; and in March, 1779, he addressed to the Société Économique a letter containing the plan of his proposed Code, though he appears to have set to work too late to take part in the competition.

However, a twelvemonth later he sent to the press a number of manuscripts which were printed, but not at that time published. After an interval of nine years, with 'a patch at the end and another at the beginning,' as the author explained in a letter to Lord Wycombe, they appeared in a volume entitled *An Introduction to the Principles of Morals and Legislation*. In the autumn of 1781 Bentham had taken down a copy of the then recently printed sheets to Lord Shelburne's seat at Bowood. His host formed a high opinion of the work, and insisted upon reading this 'driest of all dry metaphysics' to the ladies after tea; but Lord Camden, the great Whig lawyer, who joined the party at Bowood, confessed to Lord Shelburne that even he found a difficulty in understanding the book, and its publication was delayed until 1789. 'The edition was very small,' wrote Bentham, 'and half of it had been devoured by rats.' The *Introduction* did not prove a success, and one reason for its failure was tersely stated by Dumont in his 'Discours Préliminaire,' prefixed to the *Traité de Législation*. 'In using several chapters of that work (*i.e.*, the *Introduction*) for the purpose of developing the General Principles of Legislation, I have sought to avoid that which interfered with its success—forms too scientific, subdivisions too multifarious, analyses too abstract.'

On the appearance of the *Traité de Législation* in June,

1802, Dumont's hopes of success were to a large extent realized. 'It is very entertaining to hear Bentham speak of it,' wrote Romilly to Dumont: 'he says that he is very impatient to see the book, because he has a great curiosity to know what his own opinions are upon the subjects you treat of.' The Empress Dowager of Russia expressed a wish that Dumont, who was visiting St. Petersburg in 1803, should be presented to her, and orders were given for a careful rendering of the *Traité*s into the Russian tongue.

Romilly, the accomplished but overworked lawyer, talked of translating the book into English, and it is greatly to be regretted that he could not find time to execute his purpose; for no other man could have been found so conspicuously well fitted for the task. In occasional passages the meaning of Dumont's work is far from being clear or unambiguous. It is probable that he did not fully appreciate some of Bentham's allusions to English laws and usages; while bald, loose, or too literal translation has, at times, only added to the existing obscurity. Thus, where Bentham wrote 'breach of trust,' we find 'la violation de confiance' rendered as 'violation of confidence'; 'peines de la maladresse' as 'pains of mal-address'; 'le viol est pire que la séduction' becomes 'robbery is worse than seduction'; 'tous les délits impliquant violation de dépôt,' 'all offences which imply a violation of deposit,' etc.

In the present edition, where access has been had to the original writings of Bentham, or the same ideas have been found expressed in other portions of his work, the text has been based on the passages referred to rather than on the presentment of his expositor in the *Traité*s, in case clearness or simplicity seemed to be favoured by the departure.

It will appear from the following pages that all Bentham's schemes of legislation were founded on the *principle of utility*. 'The right end of all human action is,' said he, 'the creation of the largest possible balance of happiness;'

and this tendency to produce happiness is what he meant by utility.<sup>1</sup> He regarded this 'sacred truth' as the sure foundation, not only of morals, but of the science of legislation. In his view, Nature has placed mankind under the governance of two sovereign masters, *pleasure* and *pain*. He sought to measure the good or evil of an action by the quantity of pleasure or pain—physical or intellectual—resulting from it. In this way he established a basis for the theory of legal rewards and punishments. It will be generally allowed that he attached too high a degree of importance to the doctrine, but it was necessary for him to find some first principle which he could receive as self-evident. Armed with this principle of 'utility,' he felt himself fully equipped to encounter and overcome any difficulty, to remove every obstacle from his path. 'He found the philosophy of law a chaos,' wrote J. S. Mill in 1838, 'he left it a science; he found the practice of the law an Augean stable, he turned the river into it which is mining and sweeping away mound after mound of its rubbish.' Perhaps his grandest achievement, said Bulwer Lytton, was the example which he set of treating law as no peculiar mystery, but as a simple piece of practical business, wherein means were to be adapted to ends, as in any of the other arts of life; and Lytton was nearer the mark than Mill.

Bentham believed that the whole duty of man might be enforced by the operation of *Sanctions* ('physical,' 'political or legal,' 'moral or popular,' and 'religious'). That is to say, he conceived certain pains and pleasures so annexed to actions as to form bonds, constraining a man, as it were, to the observance of some particular rule of life or conduct. 'Many men,' said he, 'fear the wrath of Heaven; many men fear loss of character; but all men are acted upon, more or less, by the fear of the gaol, the scourge, the gallows, the pillory, and so forth.'

<sup>1</sup> The authorities in support of statements contained in this Introduction are cited in the present editor's *Jeremy Bentham*, 1905.

But it will, further, appear in the following pages that Bentham recognized the broad distinction to be observed between the science of Morals (or, as he called it, Deontology) and the science of Political Philosophy, which embraces the art of Legislation. It may tend to the greatest happiness of the community that a man should, of his own free will, adopt a certain course of action; and yet it may well be unwise and injurious to compel him to adopt such a course of action against his inclination. It may, indeed, be the man's duty so to act, and yet it may not be right for the legislator to exercise compulsion; for the very exercise of compulsion may involve elements of mischief to the community which would countervail the good to be accomplished by enforcement of the action. In Bentham's view, much of the mischievous legislation which he assailed had come into existence through a disregard of this fundamental and cardinal distinction.

So, too, from the point of view of 'utility,' all punishment is in itself an *evil*; for every punishment involves the infliction of pain, and pain is an evil. We must therefore see to it that the punishment is not in excess of that which is absolutely necessary. The enactment of a fixed and positive penalty for a noxious action of slight or varying importance, or of a purely private nature, might well entail the creation of an evil greater than the one sought to be suppressed.

In Bentham's days it was not generally recognized that the main end of punishment was the repression and prevention of crime. There were many persons ready to act on the belief that it mattered little how many murders or felonies were committed, provided only that some man was hanged in respect of each one of them. The principle of punishment commonly accepted was that of retaliation—an eye for an eye, and a tooth for a tooth—the yielding to the impulse of anger, the gratification of the passion of revenge. Bentham allowed that punishment should be exemplary



in its character and in its surroundings; but he maintained that the *certainty* of a mild punishment, properly allotted, was far more effective than the mere *chance* of suffering death. The people will not give their aid to the enforcement of a severe and unpopular code; and, moreover, when the criminal classes see that the law hits at random and with no certain aim, they are quite ready to gamble on its chances.

The objects which the legislator should seek to attain are *Security, Subsistence, Abundance, and Equality*. Each of these must, more or less, make sacrifices to the others, and the adjustment of their conflicting claims presents a problem extremely difficult of solution. Inspired by Hume, Bentham recognized 'security' as fundamental in the civil code. It is the fount of life, of subsistence, of abundance, of happiness; when 'security' and 'equality' are in opposition, there should be no hesitation — 'equality' must give way. The establishment of 'equality' is a chimæra; all that can be done is to diminish inequality. 'The treasure of the comparatively rich is an insurance office to the comparatively indigent'; but the treasure-house must not be despoiled until the calamity insured against has actually occurred.

A few days before his death, in 1829, Dumont wrote: 'What I most admire is the manner in which Mr. Bentham has laid down his principle, the way he has developed it, and the rigorous logic of his deductions from it. The first book of the *Traité*s displays the art of reasoning upon this principle, of distinguishing it from the false notions that usurp its place. It shows, too, how evil may be analyzed, and exhibits the strength of the legislator in the four sanctions. . . . Egoism and materialism! How absurd! Look in the catalogue of pleasures for the rank which the author assigns to those of *benevolence*, and see how he finds in them the germ of all social virtues! The treatise on *Des Moyens Indirects de prévenir des Délits* contains three

chapters sufficient to pulverize all these miserable objections. One is on the cultivation of benevolence, another on the proper use of the motive of honour, and the third on the importance of religion when properly directed—that is to say, such religion as conduces to the benefit of society. I am convinced that Fénelon himself would have subscribed to every word of this teaching!’ (*cf. post*, vol. ii., pp. 274-294).

To the reader of the present day many passages in the following pages will seem mere platitudes, or, at the best, to enshrine very obvious truths. But, as Mr. Justice Stephen observed: ‘If anyone would take the trouble of reading it [*The Theory of Legislation*], with an early edition of Blackstone on one side, and a late edition of Stephen’s Commentaries on the other, he would be able to satisfy himself that it has met with a degree of success which perhaps no other book ever gained in this country’ (see Mr. H. J. Randall’s interesting article on *Jeremy Bentham* in the *Law Quarterly Review* for July, 1906). It may, too, be recalled that Professor Dicey’s masterly lectures on *Law and Public Opinion* manifest, in convincing fashion, the great influence exerted by Bentham’s writings for more than a generation after his death.

Dumont’s name is appended to such of the footnotes in the text as are taken from his work. Most of them are based on passages extracted by him from the Benthamic manuscripts, but for some of them he was himself entirely responsible.

C. M. A.

November, 1913.

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# TREATISES ON LEGISLATION.

## PRINCIPLES OF LEGISLATION.

### CHAPTER I.

#### OF THE PRINCIPLE OF UTILITY.

THE end and aim of a legislator should be the HAPPINESS of the people. In matters of legislation, GENERAL UTILITY<sup>1</sup> should be his guiding principle. The science of legislation consists, therefore, in determining what makes for the good of the particular community whose interests are at stake, while its art consists in contriving some means of realization. This Principle of Utility, when enunciated in vague and general terms, is rarely challenged. It is even looked upon as a sort of commonplace both in morals and in politics. But one must not thereby be deceived; for the assent, though almost universal, is often apparent only. The same ideas are not attached to the principle: the

'Utility' should be the guiding principle of legislation.

Assent to principle often apparent rather than real.

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. i. (1): note by Bentham made July, 1822. 'The greatest happiness or greatest felicity principle: this for shortness, instead of saying at length that principle which states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of Government. The word *utility* does not so clearly point to the ideas of *pleasure* and *pain* as the words *happiness* and *felicity* do.' Many years before Bentham had written: 'Utility is not a Law. For utility is but a quality, a property; a property an act has of increasing happiness. . . . A dictate of utility is not a law. For a dictate of utility is but someone's opinion that there is utility in a certain mode of conduct' (MSS. University College, No. 69; cited Halévy, vol. i., p. 298). (C. M. A.)

Conditions  
of applica-  
tion of  
principle.

same value is not given to it: no uniform and logical mode of reasoning results from it. To apply it with complete efficiency, that is, to make it the very foundation of a system of reasoning, three conditions must be fulfilled.

*First*, we must attach to the word *Utility* a clear and precise connotation, so that it shall convey exactly the same meaning to all those who make use of it.

*Secondly*, we must assert the supreme and undivided sovereignty of this principle by rigorously discarding every other. It is useless to subscribe to it as generally applicable; no exception to its applicability can, in any circumstances, be allowed.

*Thirdly*, we must discover some calculus or process of 'moral arithmetic' by means of which we may arrive at uniform results.<sup>1</sup>

Objections  
referred to  
two false  
principles.

The grounds of dissent from this doctrine may all be referred to two false principles<sup>2</sup> which exert on the understanding of men an influence, at times apparent, at other times wholly unperceived. And, if one can but succeed in running to earth and destroying these two, the true principle will stand alone in all its purity and strength. The three principles are, indeed, like three roads which cross each other in many places, although only one of them leads to the desired goal. Ofttimes the wayfarer finds himself straying from one road into another, and in these wanderings loses half his time and strength. Yet the right way is the easiest, for, throughout its length, there are

<sup>1</sup> This seems to be the first use of the now well-known expression 'moral arithmetic': it does not occur in the *Introduction to the Principles of Morals and Legislation*. But arithmetical terms, and a 'felicific calculus' with elements or dimensions of value, were largely employed in early MSS.; e.g., 'Observe that the number expressing the Certainty and Propinquity of a pleasure must be a fraction. The limit on the side of menace—the *maximum*—being but an *unit*. . . . A Pain or Pleasure loses in certainty, upon the single account of its being distant. But this is in a fixed ratio, the same for all pains and pleasures' (MSS. University College, No. 69; cited Halévy, vol. i., p. 300). (C. M. A.)

<sup>2</sup> The Ascetic Principle (p. 6) and the Principle of Sympathy and Antipathy (p. 9).

milestones which cannot be shifted, and directions that cannot be defaced, written in a tongue that all may understand; while the two false routes show nothing but conflicting signposts, inscribed in the language of enigma. But, without straining the use of allegory, let us seek to give a clear idea of the true principle, and of its two rivals.

Nature has placed mankind under the governance of two sovereign masters, *Pleasure* and *Pain*. To them we owe all our ideas: to them we refer all our decisions, every resolve that we make in life. The man who affects to have withdrawn himself from their despotic sway does not know what he is talking about. To seek pleasure and to shun pain is his sole aim, even at the moment when he is denying himself the greatest enjoyment or courting penalties the most severe. This maxim, unchangeable and irresistible as it is, should become the chief study of the Moralist and of the Legislator. To these two motives the *principle of utility* subjects everything.<sup>1</sup>

✓  
The sovereign rule of Pleasure and Pain.

*Utility* is an abstract term. It means the property or tendency of any particular thing to shield from some evil or to secure some good. *Evil* means pain; suffering or the cause of suffering. *Good* means pleasure, or the cause

Meaning of 'Utility.'

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. i. (1). Professor Sidgwick has called this theory *Psychological Hedonism*, seeing that it merely affirms the seeking of pleasure as a psychological fact; as distinguished from *Ethical Hedonism*, the theory of those who hold the view that men *ought* always to seek pleasure. Sidgwick, criticizing Mill's adoption of Psychological Hedonism, says: 'The truth is that there is an ambiguity in the word Pleasure, which has always tended seriously to confuse the discussion of this question. When we speak of a man doing something at his own "pleasure," or as he "pleases," we usually signify the mere fact of choice or preference; the mere determination of the will in a certain direction. Now, if by "pleasant" we mean that which influences choice, exercises a certain attractive force on the will, it is an assertion incontrovertible because tautological, to say that we desire what is pleasant—or even that we desire a thing in proportion as it appears pleasant' (*Methods of Ethics*, book i., chap. iv.). But, if we understand 'pleasure' in the sense of meaning the agreeable feeling which accompanies the satisfaction of our wants, it is not, says the author, by any means evident that this is always what we desire. In discussing the question whether the motive to action is always 'pleasure,' modern critics distinguish between *taking pleasure in an idea* and *aiming at the idea of pleasure*. (C. M. A.)



of pleasure. When we say that anything is in harmony with the utility or the interest of an individual, we mean that it tends to augment the sum total of his well-being. When we say that anything is in harmony with the utility or the interest of a community, we mean that it tends to augment the sum total of the well-being of the individuals of which the community is composed.

Meaning of  
'Principle.'

A *Principle* is a primary idea which one makes the starting-point, or the keystone, of a system of reasoning. To use a concrete metaphor, it may be likened to a fixed point to which the first link of a chain is attached. Now, such a principle must be obvious: if it be enunciated and its meaning made clear, that alone must suffice to secure its recognition. It is like the axioms of mathematics which are not proved by any direct process, but by showing that their rejection would involve one in an absurdity.

The 'Prin-  
ciple of  
Utility.'

The *Principle of Utility*, accordingly, consists in taking as our starting-point, in every process of ordered reasoning, the calculus or comparative estimate of pains and pleasures, and in not allowing any other idea to intervene.

I am an adherent to the Principle of Utility when I measure my approval or disapproval of any act, public or private, by its tendency to produce pains and pleasures; when I use the terms *just, unjust, moral, immoral, good, bad*, as comprehensive terms which embrace the idea of certain pains and certain pleasures, and have no other meaning whatsoever. And it must always be understood that I use these words *Pain* and *Pleasure* in their ordinary signification, without having recourse to arbitrary definitions for the purpose of ruling out certain forms of pleasure, or denying the existence of certain pains. None of your subtilty, none of your metaphysics! We need not consult Plato or Aristotle. *Pain* and *Pleasure* mean what everybody feels as such: peasant and prince alike, the unlearned man and the philosopher.

An adherent to the *Principle of Utility* holds virtue to be a good thing by reason only of the pleasures which result from the practice of it: he esteems vice to be a bad thing by reason only of the pains which follow in its train. Moral good is good only on account of its tendency to secure physical benefits: moral evil is evil only on account of its tendency to induce physical mischief. But when I say 'physical,' I refer to pains and pleasures of the heart and mind as well as to the pains and pleasures of sense: I have in view man, just as he is, in his actual constitution.

Should an adherent to this principle find, in the commonly accepted list of virtues, some action from which more pain than pleasure would ensue, he would not shrink from treating the alleged virtue as a vice; he would not allow himself to be deceived by a vulgar error, nor would he readily believe that we must rely on the practice of sham virtues to afford support for genuine ones. Moreover, should he find in the ordinary list of stock offences some trivial act, some harmless form of pleasure, he would not shrink from transferring the alleged offence into the category of lawful acts: he would feel sympathy with the alleged criminals, and reserve his indignation for the unctuous worthies who seek to harass them.

'Virtue'  
and 'Vice.'

## CHAPTER II.

### THE ASCETIC PRINCIPLE.

'Principle  
of Asceti-  
cism.'

THIS Principle<sup>1</sup> competes with and opposes, in the most direct fashion, the one we have just been expounding. Those who practise it have a horror of pleasure. Everything which gratifies the senses appears to them hateful and criminal. They base morality upon privations, and virtue upon self-renunciation. In a word, in direct opposition to the adherents of utility, they approve everything which tends to diminish enjoyment, while condemning everything which tends to increase it.

Ascetic  
philoso-  
phers.

Now, the principle has been more or less adopted by two classes of men, who in other respects have but little resemblance, and, indeed, affect a mutual contempt. The one class consists of Philosophers, the other of Devotees or Religionists. Ascetic philosophers, inspired by the hope of applause, have flattered themselves by seeming to soar above humanity in scorning the pleasures of ordinary mortals. It is in the shape of honour and reputation that they seek reward for all the sacrifices which they appear to make to the severity of their tenets.

Devotees,  
or Religion-  
ists.

Ascetic Devotees are foolish folk tortured by imaginary terrors. In their eyes, man is but a fallen being who ought to punish himself without ceasing for the crime of his birth, and never to avert his thoughts from the abyss of everlasting woe which is gaping at his feet. Martyrs

<sup>1</sup> *Asceticism* is derived from a Greek word which signifies *exercise* (Dumont). The word 'ascetic' has been applied to monks, whose practices were called their *exercises*, and consisted in contrivances for tormenting themselves: Cf. *Introduction to the Principles of Morals and Legislation*, chap. ii. (2). (C. M. A.)



to this crazy creed, they have nevertheless, like other men, a fund of hope. Quite apart from a certain earthly pleasure which is attached to a reputation for sanctity, these atrabilious pietists flatter themselves that every moment of voluntary suffering here below will be worth at least an age of happiness in the life to come. Thus even the *Ascetic Principle* rests on a sort of false idea of utility. It gained its ascendancy only by virtue of a mistake.<sup>1</sup>

Devotees have carried the doctrine of Ascetism further than the Philosophers. The philosophic party have scarcely gone beyond the reprobation of pleasure, while religious sects have made it a matter of duty to inflict pain upon themselves. The Stoics have denied that suffering is an evil: the Jansenists have averred that it is actually a good. Moreover, the philosophical party have never reprobated all pleasures in the lump, but only such as they styled gross and sensual; while they have even extolled those of the heart and of the understanding. It was a preference for one class, rather than complete exclusion of the other. Ever scorned or disparaged under its own name, Pleasure was welcomed and belauded as 'the Honourable,' 'the Glorious,' 'the Reputable,' 'the Becoming,' or under the guise of 'Self-respect.'

Devotees  
have gone  
further  
than  
Philoso-  
phers.

That I may not be charged with exaggerating the absurdities of ascetics, I will endeavour to suggest the least irrational origin that can be assigned to their system. It was easy to perceive that the attraction of certain pleasures might, in some circumstances, lead men astray, that is to say, might incite to mischievous acts—acts of which the

Origin of  
Asceticism.

<sup>1</sup> This mistake consists in describing the Deity, in terms, as a being of infinite benevolence; while, at the same time, ascribing to him such prohibitions and threats as would be associated with an implacable being, who used his power merely to satisfy his malevolence. These ascetic theologians might be asked, Wherein does the good of life consist, if not in the pleasures it affords us? and what security have we of the loving-kindness of God in the future life, if he has forbidden us the enjoyments of our present sojourn on earth? (Dumont).

good did not counterbalance the evil.<sup>1</sup> The very object of a healthy system of morals and of good laws is, of course, to prohibit indulgence in such pleasures, on account of their injurious consequences. Ascetics, however, have made a mistake. They have attacked pleasure in itself; they have condemned pleasures as such, they have made them the object of a general prohibition, and treated indulgence in them as the mark of a base nature. It is, indeed, only as a concession to the weakness of human nature that they have been kind enough to allow certain special exceptions.

<sup>1</sup> 'The principle of asceticism seems originally to have been the reverie of certain hasty speculators, who having perceived, or fancied, that certain pleasures, when reaped in certain circumstances, have, at the long run, been attended with pains more than equivalent to them, took occasion to quarrel with every thing that offered itself under the name of pleasure' (*Introduction to the Principles of Morals and Legislation*, chap. ii. [9]). (C. M. A.)

*and wrong principle*

### CHAPTER III.

#### THE ARBITRARY PRINCIPLE ; OR, THE PRINCIPLE OF SYMPATHY AND ANTIPATHY.

##### § I. *The Arbitrary or Capricious Principle.*

ACCORDING to this Principle, certain actions are approved <sup>'Sym-</sup> or disapproved merely because a man finds himself disposed <sup>pathy' and</sup> to approve or disapprove, without giving any reason for the decision except the decision itself. <sup>'Antip-</sup> 'I love,' 'I hate'; <sup>athy.'</sup> such is the pivot on which this Principle turns. An action is adjudged good or bad, not because it is agreeable or hostile to the interests of those whom it affects, but because it pleases or displeases him who judges. He decides as a despot, and admits no appeal: he does not conceive himself bound to justify his ruling by any consideration bearing upon the welfare of society. 'It is my internal persuasion; it is my innermost conviction; I feel that it is so.' A person of such a disposition seeks no advice. 'Confusion fall upon him who does not agree with me; he is not a man, he is a monster in human form.' So despotic is the tone of his judgments !<sup>1</sup>

But, it may be said, are there really men so unreasonable as to promulgate their own particular views as though they were universal laws, and to assume the prerogative of infallibility ? What you call the Principle of Sympathy and Antipathy is not a principle of reasoning at all; it is rather the negation the destruction of all principle. There would result from it a very anarchy of ideas, since (every man having the right to treat his own sentiment or disposi-

How the Principle is disguised.

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. ii. (11-19). (C. M. A.)

tion as a standard to regulate the sentiments or dispositions of everybody else) there would no longer be any common standard, nor any supreme Court to which appeal could be made. The absurdity of such a Principle is, of course, quite manifest, so that no man sees fit to say, in so many words: 'I desire you to think as I do, without giving me the trouble of arguing with you.' Everyone would rebel against such mad pretensions. Accordingly, recourse is had to various methods of disguise. Despotism is veiled under some happy and ingenious phrase, as the greater part of our ethical systems bear witness.

'Con-  
science',  
or 'Moral  
Sense.'

One man tells you that he has, in himself, something with which he has been endowed to teach him what is good and what is bad. This he calls either *Conscience* or *Moral Sense*; and then he goes to work at his ease, and pronounces such a thing to be good and such another thing to be bad. Why? 'Because my moral sense tells me so; because my conscience approves or disapproves.'<sup>1</sup>

'Common  
Sense.'

Another man<sup>2</sup> comes along and alters the phrase. It is no longer *Moral Sense* but *Common Sense* which teaches him what is good and what is bad. This common sense is a sense of some kind or other, which is, he says, possessed by all mankind; it being, of course, understood that those, whose sense is not the same as his, must not be taken into account.

The 'Un-  
derstand-  
ing.'

Another man<sup>3</sup> informs you that this *Moral Sense* and this *Common Sense* are mere dreams, but that his *Understand-*

<sup>1</sup> Lord Shaftesbury, Hutchinson (*sic*), Hume, etc. (Bowring, vol. i., p. 8).

<sup>2</sup> Dr. Beattie (Bowring, i. 8). Cf. MSS. University College, No. 69 (cited Halévy, i. 299): 'Another says he has a sense on purpose: and it is this sense that pronounces what is right and what is wrong. This is the way that Lord Shaftesbury, Dr. Hutchinson (*sic*), and the triumvirate of Doctors lately slaughter'd, not to say butcher'd, by Dr. Priestley, make Laws of Nature.' (C. M. A.)

<sup>3</sup> Dr. Price (Bowring, i. 8). Cf. MSS. University College, No. 69 (cited Halévy, i. 298): 'He has understanding, and his understanding, without the trouble of hearing *pro* and *con*, pronounces an action to be right or to be wrong; and so there is a Law of Nature for it or against it. This is the way Dr. Price makes Laws of Nature.' (C. M. A.)



ing enables him to decide what is good and what is bad. This understanding tells him so and so ; and all good and wise men have an understanding constructed like his. With regard to those who do not arrive at the same conclusions as he does, so much the worse for them: it is a sure sign that their understandings are either defective or corrupt.

Another man tells you that there is an eternal and immutable *Rule of Right* : that this rule of right dictates so and so.<sup>1</sup> And then he begins giving you his sentiments upon anything that comes uppermost: and these sentiments (you must take for granted) are so many branches of the eternal rule of right.

The 'Rule of Right.'

Again, you may hear a crowd of Professors, Jurists, Magistrates, and Philosophers, talking perpetually of the *Law of Nature*. They wrangle, it is true, over every point in their system; but no matter, they all talk away with the same boldness and confidence, and favour you with their views, as being so many chapters of the *Law of Nature*. Sometimes, however, the phrase is varied, and they speak of *Natural Right*, *Natural Equity*, the *Rights of Man*, etc.

The 'Law of Nature.'

We have one philosopher who undertakes to erect a system of morals on what he calls *Truth*. According to him, there is no harm in anything in the world but in telling a lie.<sup>2</sup> If you kill your father, you commit a crime because this would only be a particular way of saying he was not your father. Every act which this philosopher does not like, he disapproves under the pretext that it is a sort of lie; doing the act amounts to saying

The Principle of 'Truth.'

<sup>1</sup> Cf. *Tom Jones: the History of a Foundling*, by Henry Fielding, chap. iii. 'The former (Square) measured all actions by the unalterable rule of right and the eternal fitness of things, the latter (Thwackum) decided all matters by authority.' (C. M. A.)

<sup>2</sup> *Religion of Nature Delineated*, 4to., London, 1724, by William Wollaston (Cf. Bowring, i. 9). Wollaston was born in 1660, and died in 1724. This book was originally printed privately in 1722, and dealt with the 'intellectual theory of morality.' The author was educated at Sidney Sussex College, Cambridge. (C. M. A.)

that it ought to be done when, *in truth*, it ought not to be done.

Dogmas of  
the 'Elect.'

Of all these despots, the most candid is the man who speaks out and says: 'I am of the number of the Elect: and God himself takes care to inform the Elect, in all things, what is good and what is bad. It is he who makes himself known to me and speaks by my mouth. So let all who are in doubt come to me, and I will deliver to them the very oracles of God.'

The Principle  
tends to  
Despotism.

All these systems and many more are at bottom only the *Arbitrary Principle*, the *Principle of Sympathy and Antipathy*, couched in different forms of words. Their aim is to secure the triumph of a man's own views without the trouble of opposing them to the views of other people: so that these pretended principles serve as a pretext for, and as aliment to, despotism; at least, to that despotism of disposition which is but too apt to discover itself in practice whenever it can do so with impunity. The consequence is that, with the purest intentions, a man becomes a torment to himself and a scourge to his fellow-creatures. If of the melancholy cast, he lapses into silent grief, and, with bitterness, deplores the folly and depravity of man.<sup>1</sup> Should he chance to be of the irascible type,<sup>2</sup> he declaims furiously against all who do not think as he does. Such an one becomes the bloodthirsty persecutor, who does his evil deeds with the air of a saint: a tyrant who fans the flames of fanaticism with the mischievous energy that is begotten of belief in duty's call, and brands with charges of perversity and bad faith all those who do not blindly accept every opinion that he holds sacred.

The Principle  
sometimes con-  
forms with  
that of  
Utility.

It is, however, essential to remark that the dictates of the *Principle of Sympathy and Antipathy* often coincide with those of the *Principle of Utility*. The heart of man is ever disposed to feel a liking for what benefits him, a hatred for what is hurtful to him; so that, from one end

<sup>1</sup> Dr. Price.

<sup>2</sup> Dr. Beattie. Cf. note, *ante*, p. 10. (C. M. A.)

of the world to the other, similar sentiments of approbation or disapprobation are displayed for particular acts, according as they are beneficial or hurtful. Directed by this sort of instinct, Morals and Jurisprudence have often enough reached the goal of Utility without having any very clear idea of it; but these sympathies and antipathies do not always make sure guides. If a man refer his fortune, good or bad as the case may be, to an imaginary cause, he at once becomes subject to groundless likes and dislikes. Superstition, charlatanism, sectarian bias, and party spirit, rest almost entirely on blind or irrational sympathies and antipathies.

The most trifling incidents, a difference in fashion, some slight divergence of opinion, a diversity in taste, may be enough to present a man to the eyes of another in the guise of an enemy. What is history but a collection of the most absurd animosities, the most futile persecutions? Some prince conceives an antipathy against certain men who make use of words of little meaning and of no moment; he calls them Arians, Protestants, Socinians, Deists. Scaffolds are erected for them; ministers of the altar make ready the funeral pile; the day on which the heretics perish amidst flames becomes a national festival. Is it not a fact that there was a civil war in Russia to settle a protracted controversy as to the number of fingers which should be used in making the sign of the Cross? Have not the citizens of Rome and of Constantinople been split into implacable factions about stage-players, charioteers, and gladiators? And to give importance to these shameful squabbles, was it not pretended that the success of the *Greens* or of the *Blues* foreboded, as the case might be, abundance or famine, the triumph or the overthrow of an empire?<sup>1</sup>

Dangers of  
the Prin-  
ciple of  
Antipathy.

<sup>1</sup> Cf. Gibbon's *Decline and Fall of the Roman Empire*, chap. xl.: 'Their respective victories announced either a plentiful harvest or a prosperous navigation, and the hostility of the husbandmen and mariners was somewhat less absurd than the blind ardour of the Roman people,



Antipathy may no doubt be found in harmony with the Principle of Utility; but even then it is not a just ground of action. When through resentment we prosecute a robber in the courts, the action is indisputably a good one, but the motive is dangerous. Though antipathy may at times prompt useful deeds, it more often prompts calamitous ones. The consideration of Utility is, in truth, the only ground of action which is always sound and sure. Other motives may well be productive of good in particular cases; but to secure good effects, uniformly and consistently, we must adhere to the principle of Utility. If they are not to become harmful, sympathy and antipathy must themselves be regulated by the principle of Utility; though it neither requires nor admits of any other regulator than itself, and it is impossible to extend it too widely.

Résumé.

To sum up: the *ascetic principle* makes a frontal attack on Utility. The *principle of sympathy*, neither rejecting nor accepting, pays no heed to it, and thus drifts rudderless between good and evil. The ascetic principle is so unreasonable that its maddest upholders have never been foolish enough to follow it to its full extent. The principle of Sympathy and Antipathy does not preclude its adherents from having recourse to that of Utility, which alone neither requires nor admits any exception. *Qui non sub me contra me* (He who is not subservient to me is against me; if not my subject, he becomes my foe): such is the motto of Utility.

According to that principle, Legislation is a matter of observation and of calculation; according to the ascetics it is a matter of fanaticism; according to the principle of sympathy and antipathy, it is a matter of disposition, of

who devoted their lives and fortunes to the colour which they had espoused. . . . The bloody and tumultuous contest continued to disturb the public festivity till the last age of the spectacles of Rome. . . . Constantinople adopted the follies, though not the virtues, of ancient Rome; and the same factions which had agitated the circus raged with redoubled fury in the hippodrome' (Murray's edition of 1854, vol. v., pp. 48, 49). (C. M. A.)



imagination, of taste. The first view should commend itself to philosophers, the second to monks; while the third is like to be approved by the People, by the wits, by the commonplace moralist, and by men of the world.

### § 2. *Causes of Antipathy.*

ANTIPATHY exerts so powerful an influence over morals and legislation that it is important to investigate the causes which give birth to it.

FIRST CAUSE—*The Repugnance of the Senses.*—Nothing is more common, especially with feeble minds, than the transition from a physical to a moral antipathy. Vast numbers of harmless animals endure constant persecution because they happen to be thought ugly. Anything unusual has the power of exciting our hatred and disgust. What is called a *monster* is merely a being which differs, in some measure, from others of its kind. Hermaphrodites, whose sex cannot be distinguished, are looked upon with a sort of horror, simply because they are rare.

SECOND CAUSE—*Wounded Pride.*—A man, who does not accept my opinion, says, in an indirect fashion, that, on the particular point at any rate, he does not think much of my intelligence. A declaration of this sort wounds my self-love, and displays the man as an enemy who, not content with avowing a sort of contempt for me, will instil others with that contempt, in such measure as his opinion triumphs over mine.

THIRD CAUSE—*Authority rebuffed.*—Even when our pride is not hurt, a difference of tastes and the clash of opinions and of interests constrain us to acknowledge that our influence is limited; that we are often forced to give way to others; that our authority, which we would fain extend in all quarters, is really restricted in every direction. This perception of our weakness is the cause of secret pain and the germ of ill-blood against other people.

FOURTH CAUSE—*Confidence in Mankind weakened or destroyed.*—We love to believe that our fellow-men are

Repugnance of the senses.

Wounded or mortified pride.

Authority rebuffed.

Loss of confidence in human nature.

of such a nature as is calculated to conduce to our own happiness. Any act on their part which tends to diminish our confidence in them can hardly fail to cause us secret annoyance. An instance of imposture shows us that we cannot always rely on what they say or promise: an example of folly raises doubts as to their reasoning power, and consequently as to their future conduct. A capricious or thoughtless act drives us to the conclusion that we cannot place confidence in their affections.

lack of  
unanimity.

FIFTH CAUSE—*The Desire of Unanimity thwarted.*—Unanimity gives us pleasure. This agreement between our own opinions and those of other people is the only assurance we can have, outside ourselves, of the truth of those opinions, and of the usefulness of any act based upon their correctness. We love, moreover, to talk about subjects to our taste: it is a source of pleasurable hopes and memories. The conversation of persons whose tastes are similar to our own enhances the pleasure by fixing our attention upon these subjects and by presenting them to us in fresh aspects.

Envy.

SIXTH CAUSE—*Envy.*—One would suppose that a man, who enjoys himself without hurting anybody else, would have no enemies. Yet it might be said that, in a sense, his enjoyment makes poorer those who do not share it. It is a common remark that wealth and power recently acquired excite envy in a greater degree than when they have been long enjoyed; and, for this reason, the word *Parvenu* always has an injurious acceptation. It signifies success newly gained; and that is quite enough for envy to add, as accessory ideas, humiliating memories and an affectation of contempt.

Envy  
ends to  
asceticism.

Envy leads to asceticism. In view of the differences in age, wealth, and general surroundings, men cannot all attain the same measure of enjoyment; but privations, if sufficiently severe, may reduce them all to the same level. And thus, in questions of ethics, envy inclines us to

rigorous theories, as a means of lowering the assessable value of pleasures. It has been said, and with justice, that if a man should chance to be born with some organ of pleasure, which other mortals did not possess, he would be pursued as a monster.

Such is the origin of antipathy: indeed, you now possess a catalogue of the various sentiments which go to its manufacture. In the hope of moderating its violence, we should recollect that no two individuals can be brought to correspond in every particular; that, if we give way to this unsociable feeling, it will ever increase in virulence, and will contract more and more the sphere of our goodwill and of our pleasures; that, as a general rule, our antipathies recoil on ourselves, while it is within our power to abate, or even extinguish, them, by banishing from our minds all thoughts of the objects which excite them. Happily, though the causes of sympathy are natural and unchangeable, the causes of antipathy are casual and transitory.

Writers on morals may be divided into two classes; those who endeavour to root out the poisonous plant, Antipathy, and those who seek to propagate it. The first class are apt to be defamed: the second class stand high in public favour, because, under cover of a veil that is fair to outward view, they wait upon envy and revenge. The books which become famous most readily are those dictated by the demon of antipathy, such as libels, party pamphlets, satirical memoirs, etc. *Telemachus* did not owe its brilliant success to its moral tone or to the charm of its style, but to the general belief that it contained a satire upon Louis XIV. and his Court.<sup>1</sup> When Hume, in his History,

<sup>1</sup> 'Deux choses particulièrement chères à Louis XIV., le luxe et l'ambition guerrière, excitaient l'aversion de Fénelon; tout le *Télémaque* semble dirigé contre elles. L'auteur repousse, avec le luxe, les arts et l'industrie qui en naissent et le servent, et, pour en arrêter l'essor, il ne recule pas devant les puérides rigueurs des lois somptuaires. Il poursuit l'ambition sous toutes ses formes et varie à plaisir les peintures qui doivent la faire redouter' (*Dictionnaire Universel des Littératures*, par G. Vapereau, Paris, 1876, at p. 777). (C. M. A.)



tried to allay party spirit and to treat men's passions after the manner of a chemist analyzing poisons, he roused against himself the main body of his readers. Men did not like to have it shown that they were ignorant rather than wicked, and that past ages, which are always extolled in order to disparage the present, had really been more productive of misfortune and crime.

Difficulties  
of a writer  
who ad-  
heres to  
'utility.'

Happy, indeed, is the writer who gives himself up to the two false principles. To him pertain the whole range of eloquence, the free use of imagery, vehemence of style, exaggeration of expression, and all the vulgar phrases usually applied to portray the passions. Every one of his opinions is an authoritative pronouncement, an eternal verity, fixed and immutable as Nature or as Nature's God. As a writer he exerts the powers of a despot, and proscribes all those who do not think as he does. An adherent of the Principle of Utility is not, by any manner of means, in a position so favourable for a display of eloquence. The means of attainment differ as widely as the ends to be attained. He can neither dogmatize, nor dazzle, nor cause a surprise. He is required to define all the terms he uses, and always to use the same word in the same sense. He must take a long time in settling down, in making his foundations sure, in getting his instruments ready; and he has everything to fear from the impatience which grows weary of preliminaries, and expects to arrive at important conclusions in no time. This slow and cautious advance is, however, the only form of progress which will lead him to the desired goal; for, though it be given to eloquence to convey truth to the people, the privilege of revealing truth is, at any rate, reserved to analysis, '*Non fumum ex fulgore sed ex fumo dare lucem cogitat.*'<sup>1</sup>

<sup>1</sup> Hor., *Art. P.*, 143. (C. M. A.)

## CHAPTER IV.

### OPERATION OF THESE PRINCIPLES IN MATTERS OF LEGISLATION.

THE Principle of Utility has never been thoroughly developed, or consistently pursued, by any Legislator; but, as we have already pointed out, it has made its mark on the laws by an occasional alliance with the Principle of Sympathy and Antipathy. Ideas of Vice and Virtue, resting upon confused notions of good and evil, have been in general accord so far as to afford a common basis of construction; and Legislators, conforming with these popular ideas, have framed such fundamental laws as are necessary for the existence of society.

The Principle of Asceticism, though warmly embraced by its adherents as a rule of private conduct, has never had much influence when applied to the business of government. On the contrary, the attainment of strength and prosperity has been the aim and object of every government. The suffering actually caused by princes has sprung from mistaken notions of power and greatness, or from the gratification of their own private passions, of which public misfortunes have been the consequence but not the object. Having regard to the conditions which prevailed in that city, the strict régime of Sparta (which has been so well styled 'a convent of warriors') was necessary for its preservation, or such, at any rate, was the opinion of the man who made its laws; and, therefore, in this point of view, even that régime conforms with the Principle of Utility. And although Christian states have suffered the

Use of the  
'Princi-  
ples' in  
matters of  
Legislation

The Prin-  
ciple of  
Asceticism.



establishment of monastic orders, the vows were supposed to be taken without any form of compulsion. To torture oneself was a meritorious act; to torture another man against his will was a crime. St. Louis was in the habit of wearing a hair shirt, but he did not make any of his subjects wear one.

The Principle of Sympathy and Antipathy.

The Principle which has exercised most influence in matters of government is that of Sympathy and Antipathy. Indeed, we are constrained to refer to this Principle every act of which happiness is not the sole end and aim: and this however specious be the declared object, whether 'good behaviour,' 'equality,' 'liberty,' 'justice,' 'power,' 'commerce,' or even 'religion.' Such objects as these all command respect and ought to enter into the views of the legislator; and yet they are objects which too often lead him astray because he looks to them as ends, not as means. In the quest of happiness, he puts them in its place instead of making them subject to it.

The passion for wealth.

It thus happens that, in the world of political economy, a government, wholly concerned with wealth and commerce, looks upon society as nothing more than a workshop, regards men only as productive machines, and cares little how it plagues them if it can but make them rich. The customs, rates of exchange, the funds, absorb all its thoughts. It is careless of a multitude of evils which it might readily cure; seeking only to create new sources of enjoyment, while all the time it is placing fresh obstacles in the way of enjoying.

The passion for 'glory.'

Some governments, again, fancy that public happiness is centred in power and glory. Full of scorn for such states as are quite content with a peaceful obscurity, they must have intrigues, negotiations, wars, and conquests. They heed not the anguish that goes to make up this same glory, nor are they concerned for the innocent victims of their bloody triumphs. The lustre of victory, the annexation of some province, will serve to veil the desolation of their

own people, and cause them to forget the true end of government.

Many men do not trouble to inquire whether a state is well administered, whether its laws afford protection to persons and property, whether, in a word, its people are happy. What they demand above everything else is political liberty: that is to say, the most equal distribution of political power that can be conceived. Wherever they fail to find the particular form of government which they are pleased to affect, they see only slaves: and, if the alleged slaves chance to be quite satisfied with their own condition, if they have no wish to change it, these political wiseacres look upon them with pity and treat them with scorn and insult. Such is their fanaticism that they are ever ready to stake the whole happiness of a nation upon a civil war, in order to transfer power into the hands of people who, by reason of invincible ignorance, would be unable to make any use of it except to bring about their own destruction.

The passion for 'liberty'  
Equal distribution of political power.

Here, then, we have some examples of the chimeras which, in the world of politics, are substituted for the true quest of happiness. They are not the growth of any opposition to the principle of happiness as such, but rather the fruits of thoughtlessness or mistake. People often grasp only a small part of the Plan of Utility; they confine themselves exclusively to that part: and, while pursuing some special branch of the public welfare, they may really be working adversely to the happiness of the community as a whole. It is for the moment forgotten that each of the various ends sought after has merely a relative value; that it is only happiness in the aggregate which has an intrinsic value.

Aim should be greatest aggregate of happiness.

## CHAPTER V.

### OBJECTIONS TO THE PRINCIPLE OF UTILITY ANSWERED.

No real  
objection  
to Utility  
can be sus-  
tained.

SOME trifling verbal difficulties may be raised in connection with the Principle of Utility; but no substantial and well-defined objection can be taken to it. Indeed, how can it be combated save by reasons drawn from the principle itself? To say that it is dangerous is to say that to consult utility may prove contrary to utility.

Utility '  
and  
Virtue.'

The difficulty in this matter arises from a sort of perversity of language. *Virtue* is commonly represented as opposed to *Utility*. *Virtue*, it is said, consists in the sacrifice of our interests to our duty. In order to express these ideas clearly, it is necessary to observe that there are interests of different orders, and that in certain circumstances various interests are incompatible. *Virtue* is the sacrifice of a smaller to a greater interest; of a momentary to a lasting interest; of a doubtful to an assured interest. Every idea of virtue which is not derived from this notion is as obscure in conception as it is indeterminate in motive.

Utility '  
and  
Justice.'

Those who, for the sake of peace and quiet, want to distinguish politics from morals, and then assign Utility as the principle of one, and Justice as the principle of the other, simply make manifest the confused state of their ideas. The sole difference between politics and morals is that the one directs the movements of governments while the other directs the actions of individuals; but they have one common aim and object, namely, happiness. That which is politically good cannot be morally bad; unless,

indeed, the rules of arithmetic, which are true for large numbers, are false for small ones.

Evil may be wrought by us, even whilst we suppose ourselves to be following the Principle of Utility. A weak and narrow mind may deceive itself by taking into consideration a part only of the good and evil. A man easily moved to anger may be deceived by attaching extreme and undue importance to a particular advantage, which hides from him the inconveniences attending upon it. What constitutes a bad man is the habit of pursuing pleasures hurtful to other people; and this very habit presupposes the absence of many kinds of pleasures.

Mistakes in application of Utility.

But we ought not to charge upon the Principle of Utility faults which result from the violation of its dictates—faults, indeed, which it alone can serve to correct. If a man makes an ill reckoning, it is not arithmetic which is to blame, it is himself. If the censure passed on Machiavel be well founded, his errors did not arise from applying the *Principle of Utility*, but from applying it in mistaken fashion. This fact was clearly perceived by the author of *Anti-Machiavel*, who refutes 'The Prince' by showing that its maxims are of fatal consequence, and that bad faith is bad policy.

Those who, after reading Cicero's *Offices* and the Platonic moralists, have a confused notion of the Useful as opposed to the Honest, often citè the saying of Aristides as to a certain project which Themistocles would reveal to no one but him: 'The project of Themistocles,' quoth Aristides to the assembled people, 'is *very advantageous*, but it is *very wicked*.' They fancy they see here a manifest opposition between the Useful and the Just, but they are mistaken. It is simply a comparison of good and evil. *Wicked* is a term which presents to the mind the collective idea of the aggregate of evil resulting from a situation in which men can no longer trust one another. Aristides should have said: 'The project of Themistocles would prove useful for



a moment, but harmful for centuries. What it would bestow is naught in comparison with what it would take away.<sup>1</sup>

Utility and  
Epicurism.

It is said, now and again, that the Principle of Utility is only a revival of Epicurism; and everyone knows how destructive of good behaviour that doctrine became. It was always the doctrine of the most corrupt men.

Now, it is true that, among the ancients, Epicurus alone has the honour of having perceived the true source of morality; but to suppose that his doctrine leads to the consequences alleged is to suppose that happiness may become its own enemy. *Sic præsentibus utaris voluptatibus ut futuris non noceas.* Seneca is here in accord with Epicurus, and what more can be asked in the name of morality than the cutting off of every pleasure which is hurtful to oneself or to other men? And is not that the Principle of Utility itself?

Objection  
that there  
is no obliga-  
tion bind-  
ing on  
adherent  
of Utility.

‘That is all very well,’ they may go on to say, ‘but everyone will constitute himself the judge of what utility is; and then, when he thinks that adherence to the principle will no longer serve his own interests, there will be no obligation to bind him.’

Everyone will constitute himself judge of what utility is. That is so, and so it ought to be; otherwise man would not be a rational agent. The man who is not a judge of what is suitable for himself is less than a child—he is an idiot. The obligation which really binds men to their engagements is nothing less than the recognition of a

<sup>1</sup> The anecdote is not worth recalling, except to clear up the sense of words. It has been proved to be unfounded in fact (see Mitford’s *History of Greece*). Plutarch wished to pay a compliment to the Athenians; but he would have found it very difficult to reconcile the greater part of their history with this noble sentiment (Dumont). ‘Whether Aristides was the rogue or Themistocles the fool afterward to divulge the secret, Plutarch, with a thoughtlessness ordinary with him, omits to inform us; but he asserts, with perfect confidence, that the proposal of Themistocles was to burn the allied Grecian fleet assembled in the Bay of Pagasæ; and, with a further thoughtlessness, which has justly excited the indignation of the good Rollin, he appears to give his approbation to such an infernal project as a great idea’ (Mitford’s *History of Greece*, 1790, vol. ii., p. 44, note). (C. M. A.)



certain higher interest which outweighs every inferior interest. A man is not bound solely by the utility of a particular promise or engagement; for should the engagement become burdensome to either of the parties, he would still remain bound by the utility of engagements in general; by the confidence which every man of refinement wishes to have placed in his word, so that he may be regarded as trustworthy, and thus enjoy the advantages which attach to uprightness and to good repute.

It is not the promise or engagement in itself which constitutes the obligation; for some engagements are void, while others are unlawful. Why is this? Because they are looked upon as harmful. It is, then, the utility of the engagement which gives it force.

Acts of the loftiest virtue may all be easily reduced to terms in which their good effects and their ill effects might be submitted to a calculus; nor is virtue degraded or enfeebled by being thus represented as a product of reason, or by being interpreted in a manner at once simple and intelligible.

Mark the circle around which we are driven if we decline to recognize the Principle of Utility! I ought to keep my promise. Why? Because my conscience bids me do so. How do you know that your conscience bids you? Because I am prompted by a certain internal feeling. Why ought you to obey your conscience? Because God is the author of my being, and to obey my conscience is to obey my God. Why ought you to obey God? Because it is my first duty. How do you know that? Because my conscience tells me so, etc. Such is the everlasting circle whence there is no escape, the source of stubborn and invincible error. For, if feeling is to be our only guide, there is no longer any means of distinguishing the behests of an enlightened conscience from the promptings of a blind one. Every persecutor has the same right to persecute; every fanatic the same ground for his belief.

If you would reject the Principle of Utility because it may be ill applied, what will you put in its stead? Where

Consequences of rejecting Utility, or Self-Interest.

is the rule that cannot be abused? Where is that infallible guide to be found? Will you substitute for utility some despotic principle which appoints men to act in such and such a particular manner in servile submission and without knowing why? Will you substitute for it some anarchical and capricious principle founded solely upon your own internal and peculiar feelings?

If so, what motives will you hold out to influence men to follow your guidance? Would not these same motives be found to be dependent on self-interest in some form or another? If men do not agree with you, how will you reason with them? How will you reconcile them to your views? Before what tribunal would you cite the various sects, opinions, and contrarieties, scattered over the habitable globe, unless it be before the tribunal of their own common interest?

The Religious Principle.

✱ The most unyielding opponents of the principle of Utility are those who take their stand upon what they call the *religious principle*. They profess to take the will of God as the sole determinant of good and evil. It is, say they, the only rule which possesses all the requisite qualities, being infallible, universal, supreme, etc. My answer is that the Religious Principle is not a separate and distinct principle at all: it is really only one or other of those already spoken of, presented in a new guise. What is called the will of God can only be his presumed will, seeing that God does not declare himself to us by direct action and special revelation. Now, how does a man presume the will of God? By reference to his own will. But his own will is always controlled by one or other of the three principles already mentioned. How do you know that such and such a thing displeases God? 'Because it would be calculated to impair the happiness of man,' answers the adherent of Utility. 'Because it involves a gross and sensual pleasure which God disapproves,' answers the ascetic. 'Because it wounds my conscience, is contrary to my

natural feelings, and ought, without further inquiry, to be held accursed;’ such is the language of antipathy. ,

The Religious Principle—  
contd.

But revelation, it may be said, is the direct expression of God’s will. There is nothing arbitrary about it. It is a guide which is to be preferred before any human reasoning.

I will not answer, in indirect fashion, that revelation is not universally accepted; that even amongst Christian nations there are many people who do not accept it; and that we must needs have some principle of reasoning which is common to all men. But I do say that revelation cannot be regarded as a system, either of politics or of morals; that all its precepts require to be examined, modified, and limited one by the other. I say that, taken in a literal sense, they would turn the world upside down, get rid of the right of self-defence, destroy industry, commerce, and mutual alliances; while ecclesiastical history affords indisputable proof of the frightful evils which have, in fact, resulted from religious maxims imperfectly understood.

What a difference there is between Protestant and Catholic theologians! between the moderns and the ancients! The gospel morality of Paley is not the gospel morality of St. Nicholas; that of the Jansenists was not that of the Jesuits. The interpreters of Scripture may be divided into three classes. The first adopt the Principle of Utility as their guide in criticism; the second follow asceticism; the third follow the confused impressions of sympathy and antipathy. The first class, far from excluding pleasures, offer them in proof of the goodness of God. The Ascetics are the deadly enemies of pleasure; and, if ever it be countenanced, it is not for its own sake, but as a means to some certain necessary end. The third class approve or condemn pleasures, according to their individual fancy, without being influenced by any consideration of possible consequences. We see, then, that revelation is not a separate and distinct principle; for that term can only be properly applied to something which stands in no need of proof itself, and yet serves to prove everything else.

## CHAPTER VI.

### PLEASURES AND PAINS : THEIR VARIOUS KINDS.

' Interesting ' perceptions.

WE daily experience a variety of perceptions which give us no concern at all: which are, so to speak, constantly gliding over us without engaging our attention. In this way we find that most everyday familiar objects no longer produce sensations lively enough to cause us either pleasure or pain. The names ' pleasure ' and ' pain ' can, indeed, be properly applied only to what may be called ' interesting perceptions ' ; that is to say, perceptions which force themselves into notice amidst the crowd, and are such as we desire either to prolong or to make an end of, as the case may be.

Simple and complex perceptions.

Interesting perceptions are either simple or complex: simple when they cannot, in any instance, be resolved into more than one: complex when they are composed of several simple pains or simple pleasures, or, perhaps, of a mixture of pleasures and pains. It is the nature of the exciting cause which determines us to regard several pleasures as a complex pleasure, and not as divers simple ones. When pleasures are excited at the same time and by the action of the same cause, we are apt to treat them all as constituting a single complex pleasure. Thus, a theatrical display, which gratifies several of our senses at once by the beauty of the scenery, the dresses, the action of the players, the music, and the society, constitutes such a complex pleasure.

Catalogue of simple pains and pleasures.

The work of analysis involved in the preparation of a complete catalogue of the simple pains and pleasures has necessarily been very great. And this same catalogue,



when completed, makes such dry reading as to repel most people; for it is not the work of a novelist seeking to interest and excite, it is a bill of particulars—an inventory of our sensations.

### § 1. *Simple Pleasures.*

1. *Pleasures of Sense.*—Those which are immediately referable to our organs, independently of all association—viz., the pleasures of *Taste*, of *Smell*, of *Sight*, of *Hearing*, of *Touch*—so, too, the blessing of *Good Health*, that delightful flow of spirits, that perception of a light and sportive existence, which is not to be referred to any one sense in particular, but to all the vital functions. And, finally, the pleasure of *Novelty*, such as we derive from the application of new objects to any of the senses. These two last-named pleasures do not form a separate class, but they play so important a part that it becomes necessary to mention them specifically.

Pleasures  
of Sense.

2. *Pleasures of Wealth*—meaning thereby the kind of pleasures a man is apt to derive from the consciousness of possessing an estate or some article of property which is an instrument of enjoyment or security, and more particularly so at the time of its first acquisition.

Pleasures  
of Wealth.

3. *Pleasures of Skill.*—Those which result from some difficulty overcome, from a sense of relative perfection in the mode of handling or using instruments such as may be applied to promote pleasure or utility. Thus, for example, a man who plays the harpsichord experiences a pleasure perfectly distinguishable from that which he enjoys on hearing the same piece of music performed by another person.

Pleasures  
of Skill, or  
Dexterity.

4. *Pleasures of Amity.*—These pleasures accompany the persuasion of a man's being in possession of the goodwill of such and such assignable person or persons in particular; and as a fruit of this goodwill, of his being in a way to have the benefit of his or their spontaneous and gratuitous services.

Pleasures  
of Amity.



Pleasures  
of Good  
Repute.

5. *Pleasures of Good Character or Repute.*—These pleasures accompany a man's possession or acquisition of the esteem and goodwill of the world about him; that is, of such members of society as he is likely to have any commerce with : and, as a fruit of this disposition, they are allied with a reasonable expectation of benefit from the spontaneous and gratuitous services of such persons in case of need.

Pleasures  
of Power.

6. *Pleasures of Power.*—Those experienced by a man who feels himself in a position to dispose people, through their hopes and fears, to give him the benefit of their services : that is to say, through the hope of some good office, or through the fear of some disservice, that he may be in the way to render them.

Pleasures  
of Piety.

7. *Pleasures of Piety.*—Those which accompany the belief that one has acquired or possesses the goodwill of God; and that, as a fruit of such goodwill, one is entitled to expect the bestowal of peculiar favours either in this life or in the life to come.

Pleasures  
of Benevo-  
lence.

8. *Pleasures of Benevolence*—to wit, such pleasures as we are able to derive from contemplating the happiness of those whom we love. These may also be called the *pleasures of sympathy*, or the *pleasures of the social affections*. Their force is more or less expansive; for they have the property of concentrating within the compass of a narrow circle or of diffusing themselves over the whole human race. Benevolence may, too, be extended towards animals, when we have a fondness for the species or particular members of it : the signs of their happiness afford us distinct pleasure.

Pleasures  
of Malevo-  
lence.

9. *Pleasure of Malevolence.*—These pleasures result from the sight or the thought of pain endured by beings whom we do not like, whether they be men or animals. These may also be styled the pleasures of the *irascible appetite*, of *antipathy*, of the *anti-social affections*.

Intellectual  
Pleasures.

10. *Intellectual Pleasures.*—When we apply our minds to the acquisition of new ideas, and discover, or fancy we discover, interesting truths in morals or physical science,

the pleasure we experience may be called the *intellectual pleasure*, or the *pleasure of knowledge*. The transport of joy felt by Archimedes on solving a difficult problem is readily understood by all men who have engaged in abstract studies.<sup>1</sup>

11. *Pleasures of Memory*.—After having enjoyed such and such pleasures, or even, in some cases, after having suffered such and such pains, we experience pleasure in recalling them exactly in the order and circumstances in which they were actually enjoyed or suffered. Such pleasures are as various in kind as the recollections which give rise to them. Pleasures of Memory.

12. *Pleasures of Imagination*.—Sometimes memory will suggest the idea of certain pleasures which we may group, at will, in a different order, and accompany by circumstances of the most agreeable character, such as we have noted in our own life or in that of others. These become pleasures of imagination. The painter who copies nature may be said to represent the operations of memory; while he who makes selections here and there, and then groups at pleasure, represents the work of the imagination. New ideas in Art and Science, discoveries which gratify our curiosity, may all create pleasures of the imagination; and thus its range of enjoyment is ever stretching wider and wider. Pleasures of Imagination.

13. *The Pleasure of Hope* consists in the contemplation of any sort of pleasure referred to time *future*, accompanied by the expectation of presently enjoying it. Pleasure of Hope or Anticipation.

14. *Pleasures of Association*.—An object may not in itself afford any pleasure, and yet, when associated in the mind with some pleasurable object, may, by virtue of this association, partake of a pleasurable quality. Thus, the various incidents of a game of chance, when played for nothing, derive their pleasurable quality from their association with the pleasure of acquiring wealth. Pleasures of Association.

<sup>1</sup> This paragraph does not appear in the original edition of Dumont's work. It was inserted in the edition of 1830. (C. M. A.)

Pleasures  
connected  
with pain.

15. Lastly, there are pleasures grounded upon pains. When one has been enduring pain of any kind, the cessation or abatement of the pain, in itself, constitutes a pleasure, and often a very lively one. These may also be styled *pleasures of relief*, or of *deliverance*; and they may, of course, be distinguished into as many species as there are of pains.

Constitu-  
tion of  
complex  
pleasures.

Such are the constituent essences of all our enjoyments. They unite, combine, and react upon each other in a thousand different ways; so that it requires some little care and practice to disentangle all the simple pleasures which go to constitute a single complex one.

A Country  
Scene.

The charm of a country landscape is compounded of various pleasures of the senses, the imagination, and sympathy. The great variety of objects, the forms and colours of the flowers, the graceful shapes of the trees, the mingling of light and shade, delight the eye; the ear is soothed by the blithe song of birds warbling in the woods, the murmur of the fountains, and the gentle rustling of the wind among the leaves. The air, laden with the fragrance of newborn vegetation, wafts delightful odours, while its limpid purity speeds the blood coursing through the veins, and makes every movement brisker. Imagination and benevolence conspire to add fresh beauty to the scene by presenting to us ideas of wealth, abundance, and fertility. The innocent joy of the birds, the flocks, and the domestic animals, furnish an agreeable contrast to memories of the toil and stir of life. We lend to the denizens of this champaign the pleasure which we ourselves derive from the novelty of the scene; while gratitude to the all-powerful and beneficent Being, whom we look up to as the author of all these blessings, augments our trustful admiration.

## § 2. *Simple Pains.*

Pains of  
Privation.

1. *Pains of Privation.*—These pains correspond to all such forms of pleasure as, by their absence, excite a feeling of chagrin: they may be ranged within three principal



categories, and distinguished thus: *First*, when the fear of not enjoying any particular pleasure for which we yearn is greater than our expectation of actual enjoyment, the resulting pain is called the pain of *desire*, or of unsatisfied desire. *Secondly*, when we have a confident hope or expectation of enjoyment, and that expectation is abruptly made to cease, we experience the pain of *disappointment*. *Thirdly*, when we have the present enjoyment of a pleasure, or, what comes to the same thing, feeling an assurance of possession, count strongly on its enjoyment, and are then deprived of it, the privation takes the form of a pain of *regret*. As to that languor of spirit named *ennui*, it is a pain of privation not referable to any particular origin, but, rather, to the absence of every agreeable sensation.

2. *Pains of the Senses*.—These pains are nine in number: those of *hunger* and of *thirst*; those of *taste*, of *touch*, of the organ of *smell*, produced by the application of substances which excite disagreeable sensations; those of *hearing* and of *sight*, produced by sounds and visible images which offend the organs of these senses, independently of association; those resulting from *excessive heat or cold*, unless, indeed, these be referable to the touch; *diseases* of all kinds; finally, *fatigue*, whether of mind or body.

Pains of the  
Senses.

3. *Pains of Awkwardness*.—These we experience sometimes in the course of unsuccessful attempts, or laborious efforts, to apply to their various uses the tools and instruments which minister to our enjoyments or necessities.

Pains of  
Awkward-  
ness.

4. *Pains of Enmity*.—Those which a man feels when he believes himself obnoxious to the ill-will of such or such an assignable person or persons in particular; and fears that, as a result, he may be made to suffer, in some way or other, from this ill-will.

Pains of  
Enmity.

5. *Pains of Ill Repute*.—Those which a man feels when he believes himself to be obnoxious, or in a way to become obnoxious, to the ill-will or contempt of the world about

Pains of  
Ill Repute.

him. These may likewise be called *pains of dishonour* or *pains of the popular sanction*.

6. *Pains of Piety*.—These pains result from the fear of having offended the Supreme Being, and thereby incurred punishment, either in this life or in a life to come. If supposed to be well-founded, they are called *Religious Fears*; if assumed to be ill-founded, they are known as *Superstitious Fears*.

7. *Pains of Benevolence*.—These we experience when we behold or ponder on the sufferings of our fellow-creatures or of the animal creation. Emotions of Pity make our tears flow for the woes of others as well as for our own. They may, with equal propriety, be styled *Pains of Sympathy*, or of the *Social Affections*.

8. *Pains of Malevolence*.—These are experienced by a man when he reflects on the good fortune of those whom he dislikes. They may also be called *Pains of Antipathy*, or of the *Anti-social Affections*.

9, 10, 11. The pains of *Memory*, of the *Imagination*, and of *Anticipation*, are the exact reverse and counterpart of pleasures of the like name.

When the same cause produces several simple pains, they are regarded as a single complex pain. Thus, exile, imprisonment, confiscation, are so many complex pains, capable of being resolved by reference to our categories of simple pains.

If the preparation of these catalogues has been a dull and exhausting task, it is pleasing to recall that it is one of great utility. The whole system of *Morals*, as well as any scheme of *Legislation*, rests upon this single foundation, the *Knowledge of Pains and Pleasures*. It is the groundwork of all clear ideas on these subjects. When we speak of vice or of virtue, of actions innocent or criminal, of a scheme of rewards and punishments, to what do we refer? Pains and Pleasures, and nothing else. Any

Pains of  
Piety.

Pains of  
Benevo-  
lence.

Pains of  
Malevo-  
lence.

Pains of  
Memory,  
Imagina-  
tion, or  
Fear.

Knowledge  
of pains  
and  
pleasures  
is ground-  
work of  
Morals and  
Legislation.



reasoning in morals or legislation which cannot be translated into these simple terms, Pain and Pleasure, is obscure and sophistical reasoning, from which no conclusion can safely be drawn.

We will say that you wish to study the question of *Offences*, the subject which exerts a dominating influence over every form of legislation. This study will be, at bottom, nothing but a comparison, an estimate of pains and of pleasures. Again, if you would consider the *criminality* or the *evil* of particular acts, that is only another way of saying, the *pains* which those particular acts entail on such or such individuals: if you would know the *motive* of the criminal, that signifies merely the allurements of some *pleasure* or other which has seduced him to commit the crime. So, too, the *profit* of the crime means the acquisition of some *pleasure* or advantage which has resulted from its commission: while the *legal punishment* to be inflicted is neither more nor less than one of the *pains* which it is ordained that a culprit shall undergo. This theory of pains and pleasures is, then, the groundwork of the whole science of legislation.

The more one examines these two catalogues, the more food for reflection will they be found to contain. We see at once that pleasures and pains may be divided into two classes: those which relate to others, and those which are strictly personal to the individual. The first class comprises pleasures and pains of benevolence and malevolence, while all the rest belong to the second class. In the next place, we notice that there exist several kinds of pleasures to which there are no correspondent pains. This remark applies to the *Pleasures of Novelty*: the sight of new objects is a source of pleasure, while the mere absence of new objects does not induce the sensation of pain. So, also, to the *Pleasures of Love*: the mere lack of such pleasures does not cause positive pain, unless, indeed, desire has been baulked, when there may result a pain of

General  
remarks on  
the cata-  
logues.

the mental class—the pain of unsatisfied desire. Certain temperaments, doubtless, suffer from the want of sexual indulgence; but, speaking generally, continence, that is to say, the deliberate abstention from such indulgence, is accompanied by a desire for sexual pleasure, and this state is by no means one of positive pain.

Nor have the Pleasures of *Wealth* and of *Acquisition* any correspondent pains, in case there be no disappointment. It is always pleasant to acquire, but mere non-acquisition is not felt as a pain. And, lastly, the *Pleasures of Power* stand on the like footing. Their possession is an advantage; but their absence does not, in itself, amount to an evil. Such absence is only felt as an evil by reason of some special circumstance, such as deprivation or disappointed expectation.

## CHAPTER VII.

### PAINS AND PLEASURES CONSIDERED AS SANCTIONS.

THE will cannot be influenced except by motives; and to speak of a *motive* is to speak of Pain or Pleasure. A being, in whom we were powerless to excite an emotion either of pain or of pleasure, would, so far as we are concerned, be utterly independent.

Meaning of  
'sanction.'

The pain or the pleasure, which is attached to the observance of a law, forms what is called the *sanction* of that law.<sup>1</sup> The laws of one State are not laws in another; and for this reason, that they have there no sanction, no obligatory force. Now, we find four distinguishable sources from which pleasures and pains are wont to flow: the *Physical*, the *Moral or Popular*, the *Political*, the *Religious*.<sup>2</sup>

Regarding pains and pleasures in the character of punishment and reward attached to certain rules of conduct, we may, therefore, distinguish four sanctions:

<sup>1</sup> The terms 'sanction' and 'enforcement of obedience' are applied by Locke and Bentham to conditional good as well as to conditional evil; but Austin urges that 'to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience is surely a wide departure from the established meaning of the terms' (Campbell's edition of the *Jurisprudence*, 1911, vol. i., p. 91). (C. M. A.)

<sup>2</sup> Writing to Dumont, October 28, 1821, Bentham said: '*Sanctions*. Since the *Traités*, others have been discovered. There are now: I. Human: six, viz.: (i.) Physical; (ii.) Retributive; (iii.) Sympathetic; (iv.) Antipathetic; (v.) Popular, or Moral; (vi.) Political, including Legal and Administrative. II. Superhuman *vice* Religious: all exemplifiable in the case of drunkenness; viz., the punitive class.

NOTE.—Sanctions in *genere* duæ, punitoriæ et remuneratoriæ; in *serie*, septem ut super; seven multiplied by two, equal fourteen' (Bowring vol. i., p. 14). Cf. also Bentham's *Deontology* i., pp. 118-821. (C. M. A.)

Physical or  
natural  
sanction.

1. The *physical or natural* sanction comprises the pains and pleasures which we may experience, or expect, in the ordinary course of nature, not purposely modified by any human interposition.

Moral or  
popular  
sanction.

2. The *moral* sanction comprises such pains and pleasures as we experience, or expect, at the hands of our fellows, prompted by feelings of hatred or goodwill, of contempt or regard : in a word, according to the spontaneous disposition of each individual. This sanction may also be styled *popular* ; the sanction of *public opinion*, or of *honour* ; or the sanction of the *pains and pleasures of sympathy*.<sup>1</sup>

Political or  
legal  
sanction.

3. The *political* sanction comprises such pains and pleasures as we may experience, or expect, at the hands of the magistracy, acting under the law. This might, with equal propriety, be termed the *legal* sanction.

Religious  
sanction.

4. The *religious* sanction comprises such pains and pleasures as we may experience, or expect, in virtue of the forebodings and promises of religion.

Illustration  
of the  
several  
sanctions.

A man's house is destroyed by fire. Is it by reason of his own imprudence ? If so, it is a punishment of the *natural* sanction. Is it by direction of the magistrate ? If so, it is a punishment of the *political* sanction. Is it owing to the ill-will of his neighbours who withheld assistance ? If so, it is a punishment of the *popular* sanction. Is it supposed to have been occasioned by the immediate act of some offended Divinity ? If so, it will be a punishment of the *religious* sanction, or, in vulgar parlance, a judgment of God. This illustration shows that the same sorts of pain belong to all the sanctions: the difference lies only in the circumstances which bring them into operation.

Our classification of the sanctions will be found very useful in the course of this work. It affords a simple and uniform nomenclature, absolutely necessary to the discrimination and correct labelling of the various kinds of

<sup>1</sup> The pains and pleasures of sympathy might, perhaps, be considered as forming a distinct sanction (Dumont).



moral force, which, as intellectual levers, constitute the machinery of the human heart. They do not, of course, act upon all men in the same way or with the same effect; and, indeed, the four sanctions are sometimes found as allies, at other times as rivals, or even as open enemies. When they act together, they operate with irresistible force; when they are in direct conflict, they mutually enfeeble each other; while, even if they be rivals, they can hardly fail to lead men into hesitating and confused action.

We might readily conceive four distinct bodies, or codes, of law which would correspond respectively to the four sanctions; though the highest point of perfection would, manifestly, be reached could they be consolidated or merged in a single code. This goal is, as yet, far distant; but, after all, it may not be impossible to attain it.

Applica-  
tion of the  
sanctions  
in Codes  
of Law.

The Legislator should, however, never lose sight of the fact that he has under his direct command the *political* sanction only. The other three must, of necessity, be his rivals or his allies, either hostile to him or subservient to him; and should he leave them out of his calculations, his results will be full of error. If, however, he can bring them to unite in support of his aims, he will wield enormous power; but his only chance of joining forces is under the standard of Utility.

The *natural* sanction is the only one which never ceases to be operative; the only one which works of itself; the only one which is unchangeable in its leading characteristics. Insensibly it gathers all the others to itself, checks their deviations, and induces whatever uniformity there may be in the thoughts and opinions of mankind.

The *popular* sanction and the *religious* sanction are more variable and inconstant, more dependent upon the caprices of the human mind. Of the two, the popular sanction is the more regular and constant in its operation, the more frequently in accord with the Principle of Utility. The action of the religious sanction is more irregular,



more dependent upon times and persons, more subject to dangerous vagaries. It grows feeble when rarely called into play, and is quickened by opposition.

The *political* sanction has, in some respects, an advantage over both. Its action is more equal and uniform; it is clearer and more precise in its precepts; it works more surely and is more exemplary: in a word, it is more susceptible of being brought to perfection. Every advance it makes has a direct influence on the progress of the other two; but it embraces only a certain class of actions. It has no sufficient hold on private conduct. It cannot operate except upon proofs which it is often impossible to obtain; while concealment, violence, or fraud, may afford a means of escape from it.

So that, on probing the various sanctions to find out what they can, and what they cannot, effect, we see at once the necessity for not rejecting any one of them, but of making use of all, while directing each of them towards the same end. They resemble magnets in that all their power of attraction is gone when their unlike poles come in contact, while a tenfold force is acquired by bringing their like poles together.

No sanction should be exclusively preferred.

We may observe, in passing, that the systems which have done most to divide men were founded upon some exclusive preference given to one or other of these sanctions. Each sanction has had its partisans, eager to exalt it above all the others. Each has had its enemies, seeking to lower it in public esteem by displaying its weak points, by exposing its errors, and by unfolding the evils which have arisen from its operation, without making any mention of its good effects. Such is the true explanation of all those paradoxes whereby men have been led to exalt, in turn, Nature over Society, Politics over Religion, Religion over Nature and Government, and so on.

Every one of these sanctions is susceptible of error, that is to say, of some application contrary to the Principle of

Utility; but, by making use of the nomenclature which we have just explained, it is easy, in a word, to point out the nature of the error. Thus, for example, the infamy, which, after a criminal has been punished, attaches to his innocent relatives, is an error of the popular sanction. The offence of usury, that is to say, taking interest above the legal rate, is an error of the political sanction.<sup>1</sup> Penalties directed against heresy and magic are errors of the religious sanction. Certain sympathies and antipathies are errors of the natural sanction. The first germ of the malady lies in some one of the sanctions, whence it usually spreads to the others; and it is important, in every case, to fix upon the true seat of the mischief before choosing, or applying, the remedy.<sup>2</sup>

<sup>1</sup> See Bentham's vigorous denunciations of the prohibitory laws (Bowring, iii. 1-29). 'A statutory restriction on interest,' said Mill, 'though approved by Adam Smith, has been condemned by all enlightened persons since the triumphant onslaught made upon it by Bentham in his letters on Usury, which may still be referred to as the best extant writing on the subject' (*Political Economy*, book v., chap. x., § 2). (C. M. A.)

<sup>2</sup> Some persons will be surprised that, in speaking of the moral sanctions, we have not mentioned 'conscience.' A sufficient reason for not employing the term is that it is vague and confusing (Dumont).

## CHAPTER VIII.

### THE ASSESSMENT OF PLEASURES AND PAINS.

THE diffusion of Pleasures and the avoidance of Pains are the only ends which a legislator should have in view. It behoves him, then, to acquire a just and precise appreciation of their respective values. Seeing that Pleasures and Pains are the *instruments* he has to work with, he ought to make a very careful study of their magnitude and strength, which, indeed, from another point of view, constitute their value.

Circumstances determining the value of pleasures and pains.

Now, if we examine the *value* of a pleasure, considered by itself and in relation to a single individual, we shall find that it depends on four circumstances: (1) *Its Intensity* ; (2) *its Duration* ; (3) *its Certainty* ; (4) *its Proximity*.

The value of a pain depends upon like considerations.

But, in dealing with Pains and Pleasures, it is not enough to assess their value as though they were, necessarily, isolated and independent. Pains and pleasures may have as *consequences* other pains and pleasures. If, therefore, we wish to estimate the *tendency* of any act from which pain or pleasure directly results, we must take into account two other circumstances: These are (5) *its Fecundity* or *Productiveness* ; (6) *its Purity*. A *productive pleasure* is one which is likely to be followed by other pleasures of the same kind. A *productive pain* is one which is likely to be followed by other pains of the same kind. A *pure pleasure* is one which is not likely to produce pain. A *pure pain* is one which is not likely to produce pleasure.

When the calculation is to be made in relation to a number of individuals, yet another circumstance is to be taken into account—(7) *its Extent*. That is, the number of persons who are likely to be affected by this particular pleasure or pain, as the case may be.

Suppose we wish to take exact account of the value of a certain action. We must follow, in detail, the various operations which have just been indicated. These provide the elements of a moral calculus, and Legislation may thus become a mere matter of Arithmetic. The *evil*, or *pain*, inflicted is the expenditure; the *good*, or *pleasure*, engendered is the income.

Calculus of values.

The rules of such a calculus are the same as those of any other.

This method of ours is slow but sure; while the estimate supplied by what is called 'sentiment,' though readily obtained, is liable to mistake. Moreover, it is not necessary to begin our calculation all over again every time. The affairs of life as a rule demand rapid decisions. And when a man has become familiar with this process, and has acquired the precision of thought which results from its use, he is able to compare the aggregates of good and evil so rapidly that he is rarely conscious of every step in the reasoning. He does the arithmetic without knowing it. The method of strict analysis only becomes necessary when some novel or complicated question arises, or in clearing up a debatable point, or when expounding the operation of the calculus to those who have no previous acquaintance with it.

Operation of the Calculus

This theory of a moral calculus has never been lucidly explained; but some such expedient has always been adopted in practice—at any rate, in all cases where men have had a clear view of their own interest. What is it, for example, that constitutes the value of an estate in land? Why, it is the sum of the pleasures which can be derived from its enjoyment. And does not this value



vary according to the extent of the tenure in point of time, the interval before possession can be taken, and the certainty or uncertainty of its coming into possession at all ?

When the calculus is in operation we may rest assured that mistakes, whether in legislation or in the moral conduct of mankind, are always referable to some circumstance or other which has been misconceived, forgotten, or wrongly appraised, in making the assessment of pleasures and pains.

## CHAPTER IX.

### OF CIRCUMSTANCES INFLUENCING SENSIBILITY.

A PARTICULAR cause of pleasure does not impart the same pleasure to everybody; nor does a particular cause of grief always produce the same measure of grief. Herein consists the *difference of sensibility*. This difference may be one of degree or one of kind. It is one of degree, when the impression, produced by a given cause on several individuals, is uniform in character but unequal in extent; one of kind, when the same cause results in several individuals experiencing sensations which are not even of like character. This difference in sensibility depends on certain circumstances, which influence the moral or physical condition of individuals; in the feelings of whom changes take place, corresponding to any changes in the circumstances. This is a fact established by experience.

Differences  
of sensi-  
bility.

Things do not affect us in the same way in sickness and in health, in penury and in affluence, in infancy and in old age. But so general a view as this is not enough: we must charge ourselves with a more searching analysis of the human heart. Lyonnet wrote a quarto volume on the anatomy of the caterpillar;<sup>1</sup> but morals have not, as yet, found so patient and philosophical an investigator. For myself, I lack courage to imitate him. I shall think I have done enough if I suggest a new point of view and

<sup>1</sup> *Traité Anatomique de la Chenille qui ronge le Bois de Saule*: published in 1760, containing 600 pages and 18 plates. It describes, e.g., 4,041 muscles. Pierre Lyonnet was born at Maestricht in 1707, and died in 1789. (C. M. A.)

supply a surer method of investigation to those who wish to pursue the subject.

Enumera-  
tion of cir-  
cumstances  
influencing  
sensibility.  
'Tempera-  
ment.'

1. A man's original constitution, or *Temperament* as it is called, lies at the root of the whole matter. By the word *Temperament* I mean the radical primitive disposition which attends a man from his birth—a disposition dependent alike on the physical and mental organization.<sup>1</sup> But, although this original constitution is the very foundation of everything, it is of so mysterious a nature that we find much difficulty in discriminating the effects produced on sensibility thereby from those which originate in divers other sources. We will leave it to the physiologist to differentiate the many kinds of temperament, to discover their various effects, and to display the modes in which they severally mingle. Neither the Moralist nor the Legislator dares set foot on this, as yet, unexplored land.

'Health.'

2. *Health*.—This circumstance is one we find it hard to define except in negative terms. It may be said to be the absence of any pain or sensation of uneasiness, of which the primary seat can be located in some ascertained part of the body. In point of general sensibility, we may observe that the ailing man is less sensible to the influence of any pleasurable cause, and more so to that of any painful one, than he would be if in good health.

'Strength.'

3. *Strength*.—Although closely connected with that of health, the circumstance of strength is distinguishable from it, seeing that a man may be weak enough, when compared with the average of his fellows, and yet be in no wise sick or ailing. The degree of his strength may be measured with tolerable accuracy by ascertaining the weight he can lift, or by the application of other simple tests. *Weakness* is sometimes a negative term importing

<sup>1</sup> Although many philosophers recognize only one substance, and regard these distinctions as purely verbal, they must, at any rate, allow that, if the mind is a part of the body, it is a part of a nature very different from the rest (Dumont).

the absence of strength; sometimes a relative term signifying that a person is not so strong as another with whom he is compared.

4. *Bodily Imperfection.*—By this phrase I mean some remarkable deformity; the want of some limb or faculty, the use of which is enjoyed by the ordinary run of men. This circumstance tends in general to diminish, more or less, the effect of all pleasurable impressions, to aggravate such as are disagreeable. Its effects upon sensibility, in any special case, depend, of course, upon the nature of the particular imperfection. ‘Bodily imperfection.’

5. *The Degree of Knowledge.*—This imports the quantity and quality of the ideas, which the person in question happens to have in store. We refer to such ideas as are, in some sort, of an interesting nature: that is to say, of a nature calculated to influence his own happiness or that of other men. The *enlightened* man is one who has in store many such interesting ideas; while the *ignorant* man has but few, and those of little importance. ‘Knowledge’ or ‘Intelligence.’

6. *Strength of Intellectual Powers.*—Intellectual strength is measured by the degree of facility shown in calling to mind ideas already acquired, and in acquiring new ones. Several qualities of mind may be referred to this head, such as accuracy of memory, the capacity of paying attention, clearness of discernment, liveliness of imagination, etc. Strength of understanding.

7. *Firmness of Mind.*—This quality is attributed to a man when he is less affected by present pleasures or pains than by great pleasure or great pain which is remote or uncertain. Turenne lacked firmness of mind when he was induced, by the entreaties of a woman, to betray a state secret. The youths of Lacedæmon, who suffered themselves to be scourged with rods before the altar of Diana without uttering a single cry, showed that fear of shame and hope of glory exerted greater power over them than present pain, however poignant. ‘Firmness of mind,’ or ‘Fortitude.’



'Steadiness.'

8. *Steadiness, or Perseverance.*—This circumstance has relation to the length of time during which a given motive acts upon the will, with uniform and continuous force. We say that a man lacks perseverance when the motive which impels him loses its force, without any change calculated to impair its influence; or when he is one of those who yield, by turns, to a great variety of motives.

'Bent of Inclinations,' or 'Disposition.'

9. *The Bent of Inclinations.*—When we actually experience a pleasure or pain, the manner in which it affects us is largely dependent on any idea of it that we may have formed beforehand. In most cases we are affected in a manner that corresponds with our expectation, but not always. What it may be worth to obtain possession of a woman must turn rather upon the fire of the lover's passion than upon the beauty of the woman's form. If we know the bent of a man's inclinations, we can calculate with tolerable precision the amount of pleasure or pain a given event will occasion him. The four circumstances which follow are, thus, merely subdivisions of this head: passions, or inclinations, considered in reference to certain given pleasures and pains.

'Notions of Honour.'

9 (a). *Notions of Honour.*—Such sensibility to pains and pleasures as springs from the opinions formed by our fellow-men—their regard or their contempt—is called *honour*. Now, different nations and different individuals have very varying ideas of honour; and it therefore becomes necessary to distinguish, first, the force or quality of this motive, secondly, its direction or quantity.

'Notions of Religion.'

9 (β). *Notions of Religion.*—Everyone knows how our conceptions of sensibility may be improved, or changed for the worse, by religious ideas. The most marked influences of a religion are to be observed at the period of its birth. Peaceful communities have become bloodthirsty; cowardly communities have grown bold; nations of slaves have regained their freedom; savages have submitted to the yoke of civilization. Of a truth, no cause has produced upon mankind effects so sudden and so marvellous; while

the varieties of bias which religion can impart to individuals are equally astounding.

9 (γ). *Sentiments of Sympathy*.—I give the name *sympathy* <sup>'Sym-  
pathy.'</sup> to the disposition which leads us to find pleasure in the happiness of other sensitive beings, and impels us to pity their distress. If this disposition operates towards a single individual, it is called *friendship*; if it is extended to creatures in pain, we know it as *pity* or *compassion*; if it embraces a limited class of persons, it constitutes what is styled *esprit de corps* or *party spirit*, as the case may be; if it embraces a whole nation, it is *public spirit*, or *patriotism*; while if it extends to all mankind, the term applied is *humanity*. But the kind of sympathy which plays the most important part in ordinary life is that which tends to focus the affections on certain definite individuals, such as parents, children, a husband, a wife, or one's intimate friends. This tendency serves to increase a man's general sensibility whether to pleasure or to pain. The ego seems to expand, and the isolated individual to assume a collective character. We seem to live, so to speak, a second life in the hearts of those we love; and, in our estimate of events which concern us, it is quite possible to be less sensible of their immediate effect upon ourselves than of the impressions made upon those who are bound to us by the ties of affection. In this way, it may prove the most bitter pang of some great sorrow to think of the misery entailed on those who love us, while the chief delight of some personal triumph may consist in the pleasure which their joy imparts to us. Such is the phenomenon of sympathy. Intensity of feeling is augmented by this interchange; as when mirrors, arranged to throw upon each other the rays of light, collect them in a common focus, and thus by their reciprocal reflections produce a great increase of heat. The strength of this sympathy is one reason why legislators in general like better to have married men to deal with than single, and fathers of families rather than such

'Sym-  
pathy'—  
*contd.*

as are childless;<sup>1</sup> for the law wields its most complete sway over those with whom it comes into contact at the greatest number of points. Moreover, men, deeply concerned for the happiness of those who are to follow after them, think not of the present only, but of the future; while those, who are not bound by the like ties, feel an interest which extends only to their own lifetime. As to the sympathy induced by these family ties, it is to be noted that it may come into play quite independently of any question of affection. Honour gained by the sire sheds its rays on the son: what reflects disgrace upon the son reflects disgrace also on the father. Members of the same family, although their interests may lie apart and their inclinations differ widely, have yet a common ground of sympathy in all that appertains to the honour of each one of them.

'Antip-  
athies.'

9 (δ). *Antipathies*.—Antipathetic biases are just the reverse of those expansive sentiments of which we have been speaking, that take their rise in the affections. But, while there are sources of sympathy which are constant and primeval—they may be found everywhere, at all times, and in all circumstances—antipathies are of course casual in their origin, and therefore transitory. Moreover, they vary with times, places, persons, and events, there being nothing about them which is fixed and determinate. Yet these two principles are, on occasion, found linked together in active co-operation: thus, the sentiment of humanity may make inhuman men hateful to us; friendship may cause us to hate those who are hostile to our friends; while antipathy itself may supply a bond of union between two persons who have a common enemy.

'Madness'  
or 'De-  
rangement  
of Mind.'

10. *Madness or Disorder of Mind*.—Mental imperfections may be reduced to ignorance, weakness of mind, irrita-

<sup>1</sup> Cf. Bacon's *Essays*: 'Of Marriage and Single Life.' 'He that hath wife and children hath given hostages to fortune; for they are impediments to great enterprises, either of virtue or mischief.' (C. M. A.)



bility, and unsteadiness. But the term *madness* is reserved for that extraordinary degree of imperfection which is as obvious and unquestionable as the most conspicuous bodily defect. It not only imparts and carries to excess all the imperfections above mentioned; but, in addition, it gives a preposterous, and even dangerous, bent to the inclinations. Upon some particular point, the sensibility of the madman may be extreme, while in other regards it may seem non-existent. He appears to be seized by excessive distrust, by a devilish malignity, to be deprived of every sentiment of benevolence. He no longer has any respect for himself or for others; he outrages all decorum and all propriety; but he is not insensible to fear or to kindly offices; he yields to firmness, while gentle treatment makes him tractable. Yet he has hardly any care for the future, and he can be controlled only by direct and immediate action.

II. *Pecuniary Circumstances.*—These are measured by the proportion which a man's *means* bear to his *wants*. His means depend upon three factors: (1) His property, that is, what he has in store independently of his labour; (2) the profits of his labour; (3) the pecuniary aids which he may reasonably expect from relations or friends. His wants depend upon four factors: (1) His habits of expenditure. To possess what is unnecessary for indulgence in these habits is superfluity, to lack what is necessary for such indulgence is privation; the greater part of our desires would not come into existence at all but for the recollection of some past enjoyment. (2) The persons whom he is charged to support, either by the laws or by the customs of his country, such as children, poor relations, or old servants. (3) Casual and unexpected demands. A given sum may have much greater value at one time than at another; as, for example, if it is needed to carry on an important lawsuit, or for a journey on which the fortunes of a family depend. (4) His expectations of an inheritance,

'Pecuniary  
Circum-  
stances.'



of gains in some enterprise, etc. It is manifest that such expectations may operate as real wants, proportioned to the strength of the expectations; for, if his hopes be defeated, he may experience a sense of privation akin to that occasioned by the loss of an estate already in possession.

## § 2. *Secondary Circumstances which affect Sensibility.*

Secondary  
influencing  
circum-  
stances.

Writers, wishing to account for differences of sensibility, have ascribed them to circumstances of which we have, as yet, made no mention: sex, age, rank, education, habitual occupations, climate, race, government, religion—all circumstances very obvious, quite open to observation, and most convenient for explaining the various phenomena of sensibility. Yet, after all, they are only *secondary* influencing circumstances; I mean that, in themselves, they afford no adequate explanation of divergence, but must, in turn, be explained by means of the circumstances described in the first section; each of the secondary circumstances containing in itself several of the primary influencing circumstances. Thus, when we speak of the influence of sex upon sensibility, we simply call to mind by a single word various primary circumstances: strength, knowledge, firmness of mind, perseverance, ideas of honour, sentiments of sympathy, etc. So, when we speak of the influence of rank, we mean thereby a certain combination of primary circumstances, such as degree of knowledge, ideas of honour, family connection, habitual occupation, pecuniary circumstances. It is the same with all the others; each secondary circumstance may be explained by a certain number of the primary ones. This distinction, although essential, has never yet been analyzed. Let us, then, proceed to a more detailed examination.

‘Sex.’ 1. *Sex*.—The sensibility of women seems to be greater than that of men. Their health is more delicate. In point of strength of body, degree of knowledge, intellectual powers,

and firmness of mind, they are commonly inferior. Their moral and religious sensibility is keener and more alert; sympathies and antipathies have greater sway over them. A woman's notion of honour consists rather in modesty and chastity; that of a man, in uprightness and courage. The religion of woman inclines more readily towards superstition; that is to say, towards trifling observances. For her own offspring all their lives long, and for children in general while very young, her affection is commonly stronger than that of the male. Women have more compassion for unhappy beings whom they see in pain, and the very care they bestow in relief of suffering seems to create a fresh bond of sympathy; but their benevolence is confined within a narrower circle, and is less often regulated by the principle of Utility. It is seldom that their affections expand so as to embrace the welfare of their country in general, much less that of mankind at large; and even such interest as they assume in party matters takes its rise almost always in some personal sympathy. Their attachments, as well as their antipathies, depend rather on fancy and caprice; while a man has more regard to individual interests or to public utility. Their occupations, in the nature of recreation, are quieter and more sedentary. On the whole, woman is more useful in family life, and man in affairs of state: domestic economy is best placed in the hands of woman, general administration in the hands of man.

2. *Age*.—Each period of life acts upon sensibility in a 'Age' distinctive fashion; but it is extremely difficult to take any exact account of the effects produced, inasmuch as the limits of the several periods vary with the individual, and are, indeed, in all cases, quite arbitrary. In treating of infancy, adolescence, youth, maturity, decline, and decrepitude, as distinct periods of human life, we can only indulge in vague generalities. Thus, we may observe that, during infancy, the various imperfections of mind, already

mentioned, are so marked that this age has need of constant and vigilant protection. The affections of adolescence and early youth, while lively and prone to passion, are seldom controlled by the dictates of prudence. The legislator is therefore compelled to keep persons of that age from straying into the paths whither their inexperience and the play of their passions would lead them. In the stage of decrepitude there is, in many respects, a relapse into the imperfections of infancy.

‘ Rank.’

3. *Rank*.—The effects of this circumstance are so largely dependent on the political constitution of the particular State that it is almost impossible to propound any proposition as worthy of general acceptance. We may say, however, that the quantum of sensibility is commonly greater in the higher ranks than in the lower, the influence of ideas of honour being specially powerful.

‘ Education.’

4. *Education*.—To the *physical* part of a man’s education belong the circumstances of health, strength, and hardiness: to the *intellectual* part, those of quantity and quality of knowledge, and in some measure, perhaps, those of steadiness and firmness of mind: to the *moral* part, the bent of his inclinations, his ideas of honour and religion, his sentiments of sympathy, etc. To all three branches, indiscriminately, appertain his habitual occupations, his recreations, his connections, his habits of expense, and his pecuniary resources. But, when we are speaking of his education, we must not forget that, in all these points, its influence is, possibly, modified by a concatenation of exterior occurrences; or, it may be, by his natural disposition and in a manner altogether out of the reach of calculation.

‘ Habitual Occupation ’ or ‘ Profession.’

5. *Habitual Occupations*.—As well those which a man pursues for the sake of profit, as those which he pursues for the sake of present pleasure and of his free choice. These exert an influence on all the other circumstances—health, strength, knowledge, inclinations, ideas of honour, sympathies, antipathies, fortune, etc. Thus, we see common

traits of character in the members of particular professions, especially those which constitute definite ranks or conditions, such as ecclesiastics, soldiers, sailors, advocates, or judicial authorities.

6. *Climate*.—At first too much importance was attached to this cause, and then, afterwards, it was rated as of none at all. Indeed, a precise estimate is rendered difficult because, in comparing nation with nation, we can only present certain broad facts which may be explained in various ways.

It seems beyond doubt that in warm climates men are not so strong or hardy : there is less need for them to labour, as the soil is more fertile : they are more prone to the pleasures of love, a passion which begins to manifest itself at an earlier period and with greater warmth. Their sensibilities of all kinds are more intense ; their imagination is more vivid, they are more quick-witted, but possess less strength and steadiness of mind ; their habitual occupations savour more of sloth than of activity. They have probably from birth a bodily frame of less vigour, a cast of mind less fixed and firm of purpose.

7. *Race*.—A man of negro race, born in France or England, is a very different being, in many respects, from a man of French or English blood. A child of Spanish race, born in Mexico or Peru, is at the hour of its birth a different sort of being from a child of the original Mexican or Peruvian race. Race may influence the natural stock which serves as a foundation for everything else. But afterwards it operates in much greater measure through the medium of moral, religious, sympathetic, and antipathetic biases.

8. *Government*.—The influence of this circumstance operates much in the same way as the influence of education. The magistrate<sup>1</sup> may be regarded in the light of a national tutor ; and, indeed, under a watchful and solicitous govern-

<sup>1</sup> The magistrate is the instrument employed by the legislator to put the laws into operation. Helvetius (says M. Halévy), inspired by the same idea, magnified the influence of the legislator, perhaps beyond reasonable bounds. He did not regard the lawgiver as having com-



'Govern-  
ment'—  
contd.

ment, the actual preceptor, nay, even the father himself, is but a deputy, as it were, to the magistrate, with this difference, that his controlling influence is subject to a time limit, while that of the magistrate dwells with a man to his life's end. This cause operates with immense effect, and spreads in almost every direction; or, rather, it influences everything except temperament, race, and climate. Nay! even health may be dependent upon it in more ways than one—for example, in relation to police administration, the supply of food, and the removal of nuisances. The system of education, the mode of regulating employment, the scheme of rewards and punishments, such things will determine the physical and moral characteristics of a nation. Under a well-constituted, or even under a well-administered though ill-constituted, government, it will usually be found that men are more under the governance of honour, and that honour is itself awarded to actions more conformable with public utility; that religious sensibility is less affected by fanaticism and intolerance, and more free from superstition and slavish adulation. There will spring up a common sentiment of true patriotism, and men will grasp the existence of national interests. Enfeebled factions will find a difficulty in turning again to their old rallying cries; while the goodwill of the people will be directed rather to the magistrate than to party leaders, and more to the whole community than to either. Private vengeance will be neither lasting nor widely spread; the national taste will be directed toward useful expenditure—such as expeditions undertaken in the interests of learning or for improvement in agriculture, the sciences, or the beautification of the country. There will be perceptible, even in the productions of the human

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pleted his task when he had promulgated laws and imposed penalties. That writer, indeed, regarded him as, above all things, a teacher, who, by stimulating the sense of honour and guiding human passions in the direction of general utility, formed the character of the people (*De l'Esprit*, disc. iii., chap. 25; and see Halévy. p. 138). (C. M. A.)

mind, a general disposition to discuss calmly important questions affecting the public welfare.<sup>1</sup>

9. *Religious Profession.*—We may draw from this source <sup>'Religious Creed.'</sup> pretty clear indications in relation to religious sensibility, sympathies, antipathies, ideas of honour and of virtue. From the sect to which a man belongs, one may, in certain cases, judge of his knowledge, the strength or weakness of his mind, and of the bent of his inclinations. I agree that it is common enough for a man, from motives of convenience or good breeding, to make public profession of a religion to the dictates of which he pays very little inward regard. But in such a case the influence of religious profession, although weakened, is not completely destroyed. The effects of early habits, of the ties of society, and of the force of example, continue in operation even after the principle with which they were originally associated has ceased to have any application. The man who at heart is no longer a Jew, a Quaker, an Anabaptist, a Calvinist, or a Lutheran, does not altogether abandon the sort of partiality he entertained for those of his own persuasion, or the corresponding antipathy against those of every other.

### § 3. *Practical Application of the Theory of 'Sensibility.'*

It is impossible to calculate the motion of a vessel without ascertaining the circumstances which affect her speed, such as the force of the winds, the resistance of the waves, the section of the hull, the weight of the cargo, etc. So, also, in matters of legislation, we cannot proceed with any degree of assurance without considering all the circumstances which tend to influence sensibility. At this stage I confine myself to what concerns the Penal Code; and that code demands, in all its parts, scrupulous attention to this diversity of circumstances.

<sup>1</sup> See further, as to the influence of government and legislation, 'Penal Code' (4th Part, Introduction, vol. ii., p. 174); 'Civil Code' (1st Part, chap. xvii., *post*, p. 196); Helvétius, *De l'Esprit*, disc. iii., chap. xxv.; and Halévy's *Jeunesse de Bentham*, pp. 138, 139. (C. M. A.)

Influence  
of Sensi-  
bility on  
practical  
Legislation.

Assessment  
of Mischief.

1. *To assess the Mischief of an Offence.*—Offences, though called by the same name, are not in reality the same, in case the sensibility of the individuals injured be not the same. For instance, a certain act directed against a woman might amount to serious insult, while in the case of a man it might be a matter of indifference. So, some bodily injury inflicted on a sick man might place his life in danger, although to one in robust health it would be of no consequence. Or, again, a libellous attack, which would bring financial ruin or dishonour on one man, might prove quite harmless if levelled against another.

Award of  
Compensa-  
tion.

2. *To award Proper Satisfaction to the Person injured.*—Forms of satisfaction, the same in name, are not really the same, in case the sensibility be essentially different. Whether certain monetary satisfaction for an affront should be regarded as adequate, or as in the nature of an insult, would depend upon the rank of the particular person affronted, his wealth, and the notions prevalent as to such matters. If I am insulted, my pardon publicly asked will prove sufficient satisfaction if craved by my superior or my equal; but not so if sought by one of inferior condition.

Effect of  
Punish-  
ment.

3. *To estimate the Strength of Punishment and its Effect upon the Delinquent.*—Forms of punishment, the same in name, are not really the same, in case the sensibility be essentially different. Banishment is not a like punishment when inflicted on an old man and on a young one, on a single man and on the head of a family, on an artisan without means of support in exile and on a wealthy man who, in effect, merely changes the scene of his amusements. Imprisonment is not a like punishment when inflicted on a man and on a woman, on a healthy person and on an ailing one, on a rich man whose family will not suffer by reason of his absence, and on a man who lives by the labour of his hands and will leave his wife and children at the mercy of the world.

Transplan-  
tation of  
laws.

4. *To transplant a Law from One Country to Another.*—Laws, couched in the same terms, are not really the same.



in case the sensibility of two nations be essentially different. A particular law, which makes for the happiness of the home in Europe, might, if transplanted into Asia, prove a scourge to the community. In Europe women are wont to enjoy liberty, and, indeed, in domestic matters to exercise supreme authority; while in Asia they are inured, by their training, to the seclusion of the seraglio, and even to a sort of slavery. In the East, marriage is not a contract of the same nature as on the continent of Europe; and if an attempt were made to apply the same laws throughout, it would certainly result in the unhappiness of all parties concerned.

*The same punishments*, it is said, *for the same offences*: and this adage makes a show of justice and impartiality which leads shallow minds astray. To give it any rational meaning, we must, first of all, ascertain what is to be understood by 'the same punishments,' 'the same offences.' A rigid, inflexible law, which paid no regard to sex, age, fortune, rank, or education, nor to the moral and religious prejudices of offenders, would be doubly vicious—at once ineffective and tyrannical. Too severe for one delinquent, too mild for another; always erring, by going too far in one case, by falling short in another, it would conceal, under an appearance of equality, the most monstrous inequality.<sup>1</sup> When one man of great fortune and another of moderate means are mulct in like penalties, is the punishment the same? Do they suffer the same quantity of pain? Is not the manifest inequality of treatment made even more hateful by the absurd pretence of equality? And is not the whole object of the law defeated, seeing that the one may lose his very means of subsistence, while the other walks off with an air of triumph? Suppose that a robust youth and a

The 'same punishments' for the 'same offences.'

<sup>1</sup> The context will make it clear that Bentham is not here advocating 'one law for the rich and another for the poor'; though his reasoning would, of course, lead to the imposition of a sentence *nominally* less severe on a man of refined mind and gentle culture, as compared with the punishment meted out to a hardy member of the vagrant class. Similarly, any money penalty imposed on a rich man must be enormously more severe than that exacted from a man of humble means. (C. M. A.)



feeble old man were both condemned to drag chains of iron for the like number of years, a reasoner skilled in obscuring the most obvious truths might manage to support the 'equality' of this punishment; but the people, who are not given to sophistry, faithful to their natural instincts and feelings, would inwardly rebel at the sight of such injustice; and their indignation, changing its object, would pass in turn from the criminal to the judge, and from the judge to the legislator.

I have no mind to ignore certain specious objections. Thus, it may be said: 'How is it possible to take account of all the circumstances which influence sensibility? How can one put a value on the inner qualities and dispositions which are hidden from observation, such as strength of mind, extent of knowledge, secret sympathies, or the bent of inclinations? Wherewithal shall they be measured in different human beings? In the treatment of his children a father may consult these inward dispositions, these diversities of character. But the master of a public school, though charged with only a limited number of pupils, is not in a position to do so; while the legislator, dealing with a considerable community, finds himself under still greater obligation not to venture beyond general laws. He ought, indeed, to be most wary lest he should cause complications by allowing special provision in particular cases. If he were to leave it to the judges to apply the laws in various ways, in accordance with the infinite diversity of characters and circumstances, there would no longer be any limit to the arbitrary nature of their judgments. Under colour of grasping the true spirit of the legislator, the judges would make the laws an instrument of caprice and double-dealing.' *'Sed aliter leges, aliter philosophi tollunt astutias : leges quatenus manu tenere possunt ; philosophi quatenus ratione et intelligentia.'*<sup>1</sup>

Objection that it is impossible to allow for all circumstances affecting sensibility.

Reply to the objection.

We are concerned to clear up this matter rather than to

<sup>1</sup> Cicero, *De Officiis*, 3 (17) (Dumont).

give a categorical answer, for it is in the nature of a difficulty raised rather than a formal objection. The principle is not denied; but it is suggested that its application may prove impossible.

Reply to  
objection—  
contd.

1. I allow that the greater part of these differences of sensibility cannot be precisely graduated or assessed; and, indeed, that it would be impossible, in some cases, to establish their existence at all. But, happily, these inner dispositions, which are hidden from observation, have, if I may say so, certain outward manifestations. They are what I have called secondary circumstances: *sex, age, rank, race, climate, government, education, religious profession*—obvious and palpable circumstances which represent inner dispositions. In this way the legislator finds relief in the most difficult part of his task. He need not pause to consider metaphysical or moral qualities; he may betake himself at once to circumstances which are quite obvious. Thus, he will decree the modification of some punishment, not by reason of the offender's greater sensibility, or by reason of his knowledge, his strength of mind, his steadiness, etc., but according to the sex or age of the culprit. It is true that presumptions raised by these circumstances are subject to error; it may be that a child of fifteen is more enlightened than a man of thirty; it may be that an individual woman has more courage or less modesty than an individual man. But, as a general rule, these presumptions will be sufficiently well founded to prevent the making of tyrannical laws, and, above all things, to secure for the legislator the approbation of the public.

2. Not only are these secondary circumstances easy to grasp, they are also few in number, and may be grouped in general classes. In respect of the various offences, they furnish grounds of justification, extenuation, or aggravation, as the case may be; and, thus, complications disappear and everything readily conforms with the principle of simplicity.

Reply to  
objection—  
*could.*

3. There is nothing arbitrary about the method. It is not the judge, it is the law itself, which modifies the particular punishment in accordance with sex, age, religious profession, etc. As to other circumstances which it is absolutely necessary to leave to the judge for investigation, such as the *more or less* in madness, strength, fortune, relationship, etc., the legislator, who cannot pass judgment in particular cases, will give directions to the tribunals in the form of general rules, and leave them a certain amount of latitude in order that they may adjust their decision to the special circumstances. What we here recommend is no Utopian scheme. There never was a legislator so barbarous or so stupid as to ignore all the circumstances which influence sensibility; he has always had a more or less confused notion of them to guide him in the establishment of civil and political rights. In the appointment of punishments, they have never been wholly neglected; hence the differences which have been allowed in the case of women, children, freemen, slaves, soldiers, priests, etc. Draco would seem to have been the only lawgiver who has disregarded all these considerations, at any rate so far as penal legislation is concerned. All offences appeared to him to stand on the same footing because they were all violations of the law. He condemned all delinquents to death without distinction. He confounded and overthrew every principle of human sensibility. His horrible work did not last long, and I doubt whether his laws were ever obeyed to the letter.<sup>1</sup> But, without going to this extreme, how many similar mistakes have been made! I should never come to an end if I began to cite instances. Is it not common knowledge that there have been sovereigns willing to lose a province, or cause men's blood to flow in streams,

<sup>1</sup> Draco was the first to compile a written code of laws at Athens. His laws were said to be written, not in ink, but in blood. After about twenty-seven years his drastic code was repealed by Solon, except in so far as it related to the shedding of blood. Statements as to the provisions of this code are, for the most part, legendary. (C. M. A.)



rather than pay heed to some special sensibility of their people, tolerate some custom in itself of no importance, or respect some prejudice, some garment, some form of prayer? A prince of our own time, active, enlightened, and prompted by a desire for fame and for the happiness of his subjects, undertook to reform everything in his country, and succeeded in inflaming everybody against himself.<sup>1</sup> On the eve of his death, recalling all the crosses of his career, he expressed a wish to have engraved upon his tomb that he had been unsuccessful in all his undertakings. For the benefit of posterity, it should have been added that he had never known how to pay due regard to the prejudices, the inclinations, the sensibility of mankind.<sup>2</sup>

When the legislator studies the human heart, when he makes provision for differences in degree and kind of sensibility by means of exemptions, limitations, and mitigations, this considerate use of power charms us as a paternal condescension, and begets the approval that we accord to the laws under the somewhat vague terms of 'humanity,' 'equity,' 'fitness,' 'moderation,' 'wisdom.' Herein I find a striking analogy between the art of the legislator and that of the physician. This catalogue of circumstances which influence sensibility is necessary to each of them. Indeed, it is a scrupulous attention to everything which can affect, or goes to make up, the condition of the particular patient that distinguishes the physician from the empiricist. But it is especially in maladies of the mind, in those cases

Allowance  
for sensi-  
bility is  
known as  
'humanity,'  
'equity,'  
etc.

<sup>1</sup> The Hapsburg Emperor, Joseph II., who was the son of the Emperor Francis I. of Lorraine and Maria Theresa of Austria. He was born in 1741, and died in 1790. He began to reign in 1765. Cf. 'Penal Code,' 4th Part, chap. lxiii. (8), *post*, vol. ii., p. 319; and see Coxe's *House of Austria*, 1807, vol. ii., pp. 567-662. (C. M. A.)

<sup>2</sup> 'A wise statesman will always consult the genius and temper of his people, and make even prejudice and superstition subservient to the general good. Joseph, unfortunately for himself and for Europe, acted in direct contradiction to this plain rule; he attempted to abolish deep-rooted institutions, and to extirpate prejudices and opinions which had been consecrated by ages' (Coxe's *House of Austria*, vol. ii., p. 659). (C. M. A.)



where the moral nature of the patient is affected—when it is a question of overcoming injurious habits or of forming new ones—that it becomes necessary to study everything which may possibly exert any influence on the inclinations of the sick man. A single mistake in this respect may upset every calculation, and what is intended to serve as a remedy may, in the result, be found to produce an aggravation of the original disorder.

## CHAPTER X.

### ANALYSIS OF POLITICAL GOOD AND EVIL: HOW THEY ARE DIFFUSED THROUGH SOCIETY.

It is, then, with government as it is with medicine; its only business is the choice of evils. Every law is an evil, because every law is a violation of liberty; so that government, I say again, can only choose between evils. What should be the aim of the legislator when making this choice? He should satisfy himself of two things: *First*, that in all cases the events which he strives to prevent are really evils; and, *secondly*, that these evils are greater than those he is about to employ as the means of prevention. He must therefore attend to both the mischief of the offence and the mischief of the law, the evil of the ailment and the evil of the suggested remedy. An evil rarely stands alone. A share of evil can hardly fall to a man's lot without spreading in all directions, as from a centre; and as it spreads it assumes divers forms. We may see an evil of one kind issuing from an evil of another kind, and even evil proceeding from good, or good from evil. All these movements are of great significance, and it is, indeed, of the very essence of legislation to recognize and distinguish them; but, happily, the changes are few in number and their differences are strongly marked. Three main distinctions, with some subdivisions, will suffice to solve the most difficult problems.

Government has for its business the choice of evils.

The consequences of mischievous action, or what we may call the mischief of an act, may frequently be separated

Primary mischief, or evil of the first order.<sup>1</sup>

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xii. (C. M. A.)

Secondary mischief, or evil of the second order.

able into two parts: (1) That which is sustained by an assignable or determinate individual, or a number of assignable or determinate individuals; and this I term *primary mischief*, or mischief of the *first order*; (2) that which, taking its origin from the former, extends itself either over the whole community or over a number of unassignable or indeterminate individuals; and this I term *secondary mischief*, or mischief of the *second order*.

Original and derivative branches of primary mischief.

The *primary mischief* of an act may, again, be separated into two branches: (1) The *original branch*, which is peculiar to any injured individual who is a sufferer in the first instance and on his own account; the person, for example, who is beaten or robbed; (2) the *derivative branch*, which is any share of the mischief that may befall other assignable individuals by reason of their connection with the first sufferer, whether such connection arise by way of personal interest or merely from sympathy.

Branches of secondary mischief: 'Alarm' and 'Danger.'

The *secondary mischief* may, in like manner, be separated into two branches: (1) The *alarm*; (2) the *danger*. The 'alarm' is a positive pain, a pain of apprehension: the apprehension of suffering mischiefs or inconveniences similar to those which have just been exhibited to view. The 'danger' is the chance that the original mischievous act may lead to other mischievous acts of the like kind. These two branches, the alarm and the danger, are intimately connected and yet perfectly distinct: either may subsist without the other. We may be in a great fright about a conspiracy which is purely imaginary, while, on the other hand, we may remain quite unconcerned in the very heart of a conspiracy which is on the point of breaking out. But alarm and danger commonly go together as natural effects of the same cause. The execution of a 'mischievous act' makes the perpetration of similar acts more probable, and, at the same time, makes us apprehensive of their occurrence: the evil deed begets danger, the prospect of danger begets alarm.

A wicked act begets danger by the force or influence of example: it paves the way for the commission of another wicked act—(1) By suggesting the idea of its commission; (2) by adding to the strength of the temptation. Let us try to follow the train of thoughts which might pass through the mind of a man on learning of some robbery that had proved successful. We will suppose that he had never heard of this mode of making a livelihood, or had not thought anything about it. Example serves to teach him, and, for the first time, puts into his head the idea of having recourse to the same expedient. He sees that the thing is feasible enough if only one sets about it in the proper way; and the enterprise having been carried through by another man with success, its dangers and difficulties are not fully present to his mind. The example becomes, as it were, a footprint to direct him down a path on which he would never have dared to be the first to tread. It has another effect, hardly less remarkable, upon his understanding; for it weakens the hold of the motives which restrain him from crime. So long as the culprit remains unpunished, the law loses part of its terror for him; while the fear of shame suffers like diminution, for the number of men guilty of kindred offences affords him, so to speak, a body of support against the odium of crime. So true is this that, wherever robberies are frequent and go unpunished, they cease to excite any feeling of shame: they stand on the same footing as any other mode of acquiring property. The early Greeks had no scruples in such matters, while the Arabs of to-day actually glory in them.

Let us apply this theory. You have been beaten, wounded, robbed, insulted. The aggregate of your personal sufferings, considered in relation to you alone, constitute the *original* branch of the primary mischief. But you have friends, and sympathy causes them to share in your affliction. You have a wife, children, parents, and a part of the indignity to which you have been subjected by

Danger  
arising  
from bad  
example.

Illustration.



the attack is reflected upon them. You have creditors who, owing to your loss, have to wait for their money. All these people suffer, in greater or less degree, mischief *derived* from yours. These two lots of mischief, yours and theirs, together make up the *primary mischief*. But that is not all. The report of the robbery, with all its attendant circumstances, circulates from mouth to mouth. The idea of danger is awakened, and, as a consequence, that of alarm. This feeling of alarm is more or less lively, according to what has been learned of the character of the robbers, their number and their resources; according to the degree of ill-treatment you have received at their hands; according to the proximity of the particular person to the scene of the robbery, his strength and personal courage, whether he travels alone or with a wife, the quantity of valuables he may have occasion to carry about with him, etc. This danger and this alarm together make up the *secondary mischief*.

'Extended'  
mischief.

If the mischief which has been done to you is of a nature to spread abroad and affect others, as, for instance, if you have been defamed by an imputation which involves a class of persons more or less numerous, it is no longer a question of mere private mischief, but of *extended* mischief; and the mischief is increased in proportion to the number of persons embraced within the scope of the imputation.

'Divided'  
mischief.

Again, suppose that the moneys which were stolen from you belonged, not to you, but to some society or to the State, I should call the loss a *divided* or *distributed* mischief; and in that case the mischief would be diminished in proportion to the number of persons involved—not increased as in the case last supposed.

'Conse-  
quential'  
mischief.

If, however, as a consequence of the wound you have received, you suffer some mischief quite distinct from the first, as the necessity for giving up some profitable adventure, or the loss of a marriage or of some lucrative office, that might fitly be called a *consequential* mischief. A mis-

chief which, when once inflicted, can never be repaired is spoken of as *permanent*; for example, some irreparable personal injury, an amputation, death; while it is described as *transient* or *evanescent* when it may be completely abated; as, for instance, a disorder which is curable, or a loss which can be fully compensated.

These distinctions, although in a measure novel, are in no wise useless refinements; for it is only by these means that we can place a precise value on the varying degrees of malignity in crime, and mete out the due awards of punishment. This analysis supplies us with a test or moral criterion, a means of decomposing human actions, as we decompose a mixture of metals, in order to ascertain their intrinsic value and the precise proportion of alloy.

If, among actions which are bad or reputed to be so, there be some which give rise to no sort of *alarm*, what a difference there is between these actions and such as do excite alarm! Original mischief affects but a single human being; derivative mischief can extend only to a small number of persons; but secondary mischief may embrace a whole community. Suppose that some fanatic assassinates a man whom he regards as a heretic, the secondary mischief, the alarm in particular, may become of infinitely greater import than the primary mischief.

Again, there is an entire group of offences of which the whole mischief consists in the *danger*. I refer to actions which, without causing hurt to any assignable individual, are injurious to the public at large. Take, for example, an offence against Justice, as where misconduct on the part of a judge, a prosecutor, or a witness, leads to the acquittal of a criminal. Mischief there is without doubt, for there is danger: danger lest the delinquent, emboldened by his escape, should repeat the crime, and danger lest other men of evil mind should receive encouragement from the rogue's success. Yet it is probable that the danger, grave as it may be, will have escaped the attention of the general

Analysis  
supplies a  
'moral  
criterion.'

Importance  
of 'alarm'

Importance  
of 'danger.'

public; while even those, who, from habits of reflection, could hardly fail to detect its presence, will not suffer any alarm from it. They have no fear of seeing the danger brought home to their own experience in any particular instance.

But the real importance of these distinctions can only be grasped as we trace their development, and we shall presently have occasion to notice a special application of them.

Mischief of  
the Third  
Order.

If we extend our survey, we shall discover a further mischief which may result from the commission of an offence. When the alarm reaches a certain point and is of long duration, its effect is not confined to a man's passive faculties: it makes impression also on his active faculties, deadening them and throwing them into a state of dejection and torpor. Thus, the harassed husbandman, when he finds himself constantly subject to pillage and annoyance, no longer tills the land except to save himself from dying of hunger. He seeks in idleness a sole remaining solace for his misfortunes; with the loss of hope he loses all heart for toil, and is content to see brambles in possession of his choicest ground. This branch of mischief might be called mischief of *the third order*; and all these distinctions are equally applicable whether the mischief is due to the act of man or to some purely physical occurrence.

Process of  
analysis  
of 'evil'  
applied to  
'good.'

Happily, it is not to 'evil' only that this power of propagation and diffusion appertains: 'good' is in like case. Follow an analogous process, and you will find proceeding from a good action, good of *the first order*, divisible into original and derivative; and good of *the second order*, productive of confidence and security. Good of *the third order* is manifested in the energy, the gaiety of heart, the passion for action which remuneratory motives alone inspire. A man, animated by this joyous feeling, discovers that he is in possession of a strength wholly unsuspected by him. The propagation of good is less rapid, less noticeable, than

that of evil; and a grain of good, if I may so speak, is less productive in hopes than a grain of evil in alarms. But this difference is amply compensated; for good is a necessary consequence of natural causes which are always at work, while evil is produced only occasionally and casually.

Society is so constituted that, in working for our own particular happiness, we work also for general happiness; and we cannot add to our own means of enjoyment without, at the same time, adding to the means of others. Two nations, like two individuals, grow rich by the interchange of commerce, while trade is based wholly on reciprocal gains.

It is fortunate, too, that the *effects* of evil are not always evil; they are, indeed, often invested with the opposite quality. Thus, punishments awarded by the courts in the case of offences, although they produce primary mischief, are not looked upon by the public as mischievous, inasmuch as they produce secondary good. True, they involve alarm and danger; but for whom? Only for a class of malefactors who, of their own free will, become obnoxious to them. Let such men but behave themselves, and they will no longer be exposed either to danger or to alarm. We should never have been able to conquer, even in some small measure, the mighty dominion of evil had we not learned how to employ certain evils in order to fight against certain others. It has been found necessary to make use of particular pains and fashion them into a sort of auxiliary force to aid us in opposing other pains which were assailing us on every side. So it is that, in the practice of an art directed to the cure of evils of a wholly different character, poisons skilfully prepared and applied have served as useful remedies.

Out of  
'evil,'  
'good'  
may come.



## CHAPTER XI.

### REASONS FOR REGARDING CERTAIN ACTIONS AS CRIMES.

Meaning of  
'Crime.'

WE have now made an analysis of evil. This analysis shows that there are certain actions from which there results more evil than good: it is actions of this kind, or, at least, those which have been reputed such, that legislators have prohibited. A prohibited action is what is called an *offence* or *crime*; and, to make these prohibitions respected, it has been necessary to institute *penalties* or *punishments*.

But is it proper to regard certain actions as crimes? or, in other words, is it proper to subject them to legal punishments?

What a question! Is not the whole world agreed upon such a point? Is it worth while to set about proving a recognized truth, a truth so firmly rooted in the minds of men? All the world may be agreed, it is true; but upon what is their agreement founded? Ask each one his reasons. You will find a strange diversity of sentiments and principles; and you will find this not only amongst the people, but even amongst philosophers themselves. Is it a waste of time to seek some uniform basis of agreement upon so vital a subject?

The agreement which, in fact, exists is only founded on prejudices which vary with times and places, opinions and customs. I have always been told that such and such an action was a crime, and crime I therefore deem it to be—that is the sort of reasoning by which the people, and even their lawmakers, are guided. But if usage has led us to regard innocent actions as crimes, small offences as great

ones, and great offences as small ones, while it has everywhere proved of a variable character, usage itself ought clearly to be subjected to some rule, and not be taken as the rule itself. Let us, then, appeal to the principle of *utility* : it will affirm the decisions of prejudice when they happen to be just, and reverse them whenever they are hurtful.

I suppose myself a stranger to all our present denominations of vice and virtue. I am summoned to consider human actions only with relation to their good or bad effects. I proceed to open two accounts ; and on the side of pure profit I place all pleasures, while on the side of loss I place all pains. I faithfully weigh the interests of all parties: the man whom prejudice brands as vicious and he whom it extols as virtuous stand before me, for the moment, on an equality. I desire to judge even prejudice itself, and to weigh in this new balance all actions whatsoever, with the intention of framing catalogues of those which ought to be permitted and of those which ought to be prohibited. This operation, which at the outset seems so complicated, will become easy if I pay due regard to the distinction which has been drawn between evil of the first, second, and third order.

Profit and  
loss ac-  
count of  
'pleasures'  
and 'pains.'

Suppose I have to examine an act which threatens the security of some individual. I compare all the 'pleasure,' or, in other words, all the profit which accrues to its author from this act, with all the 'evil,' or, in other words, all the loss, which results therefrom to any party injured. At a glance I note that the evil of the first order outweighs the good of the first order. But I do not stop there. The action in question, we will suppose, involves the whole community in danger and alarm ; and the evil, which was at first confined to a single person, spreads over all men in the shape of fear. The pleasure resulting from the action is not enjoyed by more than one, while the pain reaches a thousand—ten thousand—everybody. The disproportion, already prodigious, appears almost infinite if I pass on to

evil of the third order, by considering that, if the action in question were not repressed, there would result from it not only all this immediate mischief, but general and lasting despondency, the cessation of work, and, in the end, the dissolution of society.

Satisfaction  
of certain  
desires  
more fruit-  
ful of evil  
than of  
good.

I will now consider in turn our strongest desires, those of which the satisfaction is accompanied by the greatest pleasures : and it will be seen that the gratification of these desires, when obtained at the expense of security, is much more fruitful of evil than of good.

Enmity, or  
Hatred.

1. Let us first take *Enmity*, or *Hatred* : this affords the most usual ground for assailing a man's honour or his person. I have conceived, no matter how or why, some enmity against you, and am beside myself with passion. I insult you, I humble you, I wound you. The sight of your suffering causes me, for a time at least, a feeling of pleasure. But, even for such a time, can it be supposed that the pleasure I experience is equal to the pain you endure ? Indeed, if an atom of your pain could be depicted in my mind, is it probable that the atom of pleasure which corresponded to it would appear to me to have the same intensity ? And, in point of fact, there are only some scattered atoms of your sufferings which present themselves to my vexed and distraught imagination : for you, not one can be lost ; for me, the greater part wholly disappear. And this pleasure of mine, such as it is, soon betrays its natural impurity ; for humanity—a principle which, perhaps, nothing can stifle even in the most cruel minds—awakens secret remorse in mine. Fears of every kind ; the fear of vengeance on your part or on the part of those connected with you ; the fear of public condemnation ; and, if there remain any spark of religion in me, religious fears also—all these fears will soon spring up to disturb my sense of security and to mar my triumph. The fury of my passion has now abated ; the sense of pleasure is gone, no more to return ; remorse succeeds to both.

But on your side the suffering still remains, and may endure for many a day. And this is true even of slight wounds that time can fully heal: what, then, of those cases in which, from the very nature of the injury, the hurt is incurable; when the limbs have been cut off, the features disfigured, or the faculties destroyed? Weigh the evils—their intensity, their duration, their consequences; measure them in all their dimensions, and you will find that, from every point of view, the pleasure is inferior to the pain.

Let us pass on to the effects of the second order. The news of your misfortune has infected the minds of all men with fear, as it were with a poison. Every man who has an enemy, or who may have one, is in terror, and makes conjecture as to the injuries which it is possible for the passion of hatred to suggest. To those feeble creatures who find so many causes for grudges and disputes, whom a thousand petty rivalries are for ever setting by the ears, the spirit of vengeance proclaims a train of endless evils. Thus it is that any cruel action, likely to cause general suffering and induced by a passion of which the principle is to be found in the hearts of all men, will create an alarm, enduring until the punishment of the guilty has transferred the danger in the direction of those who delight in enmity and injustice. This alarm is a form of suffering common to all; and we ought not to forget another pain resulting from it, the pain of sympathy felt by generous hearts when contemplating the effects of such base actions.

2. If we now examine those actions which take their origin in that dominant motive, that *Desire* to which Nature has confided the perpetuation of the human race and so large a share of their happiness, we shall find that (when there results injury to personal security or to the domestic status) the good which accrues from its satisfaction bears no comparison with the consequential evil. I speak here Sexual  
Desire.  
only of the form of attack which manifestly compromises Rape.



the security of the person. I mean rape. It is idle, with some puerile ribald jest, to deny the existence of this crime, or to try to get rid of the horror of it. Whatever may be said, women the most prodigal of their favours would not relish their being snatched from them in bestial frenzy. But in this case the magnitude of the alarm renders useless all discussion as to the original mischief. Whatever may be thought of the offence when actually committed, the possibility of such an offence will always be a source of terror ; and the more widespread the lust that prompts to crime, the greater and more serious is the alarm.

In times when the laws have not been sufficiently powerful to repress it, or morals sufficiently advanced to condemn it, this crime has given rise to acts of vengeance of which history has preserved some memorials. Whole nations have taken part in the quarrel, and fierce hatreds have been transmitted from father to son. It would seem that the close confinement of Grecian women, unknown in the days of Homer, owed its origin to a period of trouble and revolution, when the feebleness of the laws had multiplied disorders of this kind and spread terror through the land.

Cupidity.

3. With regard to the motive of *Cupidity* ; if we compare the pleasure of acquiring by unlawful seizure with the pain of losing by such means, the one will not be found to be an equivalent of the other. But there are cases in which, if we could confine ourselves to effects of the first order, the 'good' would have indisputable preponderance over the 'evil' ; and if we considered the offence simply from that point of view, we could not assign any sufficient justification for the rigours of the law.

Criminality  
depends  
on the  
'alarm'  
created.

Everything turns upon the mischief of the second order ; it is that mischief which gives to the action the character of a crime, and necessitates the infliction of punishment. Let us take, for example, the physical desire of satisfying hunger. Suppose that a needy man, sorely pressed by

hunger, steals a loaf from a rich man's table, and thereby saves himself from starvation ; can we justly compare the good which he has done himself with the evil inflicted on the rich man ? This is equally true where the example is less striking. Suppose that a man pilfers from the public treasury ; he enriches himself and impoverishes nobody. The wrong which he has done to any particular individual is reduced to an impalpable atom. It is not, then, by reason of any mischief of the first order that we must consider such actions as crimes, but solely on account of the mischief of the second order.

If the pleasure attendant on the satisfaction of desires so powerful as hatred, lust, and hunger, contrary to the will of the other parties concerned, is far from equalling the pain occasioned thereby, the disproportion will appear even greater with regard to motives less active and powerful. The desire of *self-preservation* is the only one remaining which demands separate consideration.

4. If this desire has relation to some evil which the law itself seeks to impose upon an individual, we must remember that the imposition can only arise from some very pressing reason, such as the necessity for carrying into execution punishments ordained by judicial tribunals, punishments without which there would be no government, no security. Now, should the desire of escaping the penalty be satisfied, the law, in this regard, would find itself stricken with impotence. The mischief which results from the satisfaction of the desire of self-preservation is, therefore, in such case, that which results from the impotence of the law, or (what amounts to the same thing) the non-existence of any law. But the mischief which results from the non-existence of law is, in fact, the aggregate of all the various evils which law is established to prevent—that is to say, of all the wrongs done by man to men. Of course, a solitary triumph of this kind on the part of an individual over the law is not sufficient to strike the whole system with impotence ; yet

Self-Pres-  
ervation.

Resistance  
to evils  
imposed by  
law—*e.g.*,  
judicial  
penalties.

every such instance is a symptom of weakness, a step towards destruction. There results from it, then, an evil of the second order, an alarm, or at least a danger; and if the law connives at the escape, it will be in conflict with its own proper aims, and, with the object of averting one evil, will admit another much more than its equivalent.

Resistance  
to evils  
not im-  
posed by  
law: Self-  
Defence.

There remain the cases in which an individual repels some evil to which the law has not thought fit to subject him. But, since the law does not think fit that he should undergo this particular evil, it thinks fit that he should not undergo it; and, therefore, to avert this evil is in itself a good. It is possible, however, that, in making efforts to preserve himself, the individual may do some evil more than equivalent to the good occasioned by repelling the original evil.

Was the evil wrought in self-defence confined within the limits necessary for the attainment of that object, or were those limits exceeded? What relation does the evil done bear to the evil averted? Is it equal? Is it greater? Is it less? Could the evil averted have been properly compensated if the individual in question had been minded to submit to it for a time, instead of defending himself at so great a cost? These are so many questions of fact which the law ought to take into consideration when promulgating detailed regulations in regard to self-defence. An inquiry into the grounds of justification or extenuation in relation to offences is a subject which belongs to the Penal Code. It is sufficient here to observe that, in all these cases, whatever evil there may be of the first order, none of the evil which an individual can do in self-defence will produce any alarm or any danger. This is clearly so, for, if he had not been unlawfully assailed and his security threatened, he would have done nothing to lead other men to suppose that they had anything to fear from him.

## CHAPTER XII.

### OF THE LIMITS WHICH SEPARATE MORALS FROM LEGISLATION.

SPEAKING in general terms, *Morals*, or *Ethics*, is the art of directing men's actions to the production of the greatest possible quantity of happiness; and *Legislation* ought to have precisely the same end in view. Aim of Legislation.

But, although these two arts or sciences have the same aim, they differ widely in point of extent.

All actions, public or private, fall within the province of *Morals*, a science which serves as a guide to lead a man, by the hand as it were, through all the paths and bypaths of life, and in all his relations with his fellows. *Legislation* cannot act thus; and, if it could, it ought not to be for ever interfering directly with the conduct of men. The science of *Morals* requires a man to do everything which conduces to the advantage of the community, including therein his own personal advantage. But there are many actions of benefit to the community which *Legislation* ought not to enjoin, while there are many hurtful actions which it ought not to forbid, although *Morals* may well do so. In a word, *Legislation* has just the same centre as *Morals*, but it has by no means the same circumference.

For this distinction there are two valid reasons:

I. *Legislation* can have no direct influence on men's conduct except through punishments. Now, these punishments are in themselves so many evils, and cannot, therefore, be justified except in so far as there results from them a greater sum of good. But, if we were minded to enforce

Distinction between  
Morals and  
Legislation.



every moral precept by means of some punishment, the evil of the punishment would, in many cases, be greater than the evil of the offence; as, for example, if the mode of carrying the law into execution were of a nature to spread through society a degree of alarm more harmful than the evil sought to be prevented.

2. Legislation is often impeded by the risk of involving an innocent man in the fate designed only for the guilty. Whence comes this risk? From the difficulty of defining the offence, and gaining a clear and precise conception of it. For instance, rudeness, ingratitude, treachery, and other vices which the popular sanction punishes, cannot be brought under the control of the law unless they could be made subject to such exact definition as is possible with theft, homicide, perjury, etc. But, the better to distinguish the true limits of Morals and Legislation, we must here recall the common everyday classification of moral duties.<sup>1</sup>

As to Private Morals, or Ethics, as it is called, a man's happiness will depend, in part, upon such of his actions as

Duty to  
oneself:  
involving  
Prudence.

<sup>1</sup> In this chapter the passages selected by M. Dumont are not confined strictly to a discussion of the limits which separate morals from legislation—i.e., the extent to which law should enter the domain of private life. The reasoning, therefore, becomes a little difficult to follow. Bentham was of opinion that the real end to be attained was the protection of society, not the punishment of an offender. All punishment, indeed, is an *evil*; for it necessarily involves the infliction of pain, and pain is an evil. It would, therefore, be wrong to seek the enforcement of *every* moral precept by means of some prescribed penalty; because it might well happen, in the case of an injurious action of slight and varying importance, or of a purely private nature, that the law would create an evil greater than the one sought to be suppressed. Penal law can only be usefully applied within certain limits. For example, its power extends only to palpable acts or omissions susceptible of satisfactory proof. Again, there may be an insuperable difficulty in subjecting the offence to such clear and precise definition as would guard effectively against constant misapplication of the law, as in the case of rudeness or ingratitude. So, too, the risk of detection may be so slight as to raise but little expectation of punishment, as in the case of illicit intercourse between the sexes, unattended by any act of violence or public indecency; and, thus, the infliction of a penalty, in one instance out of a thousand, might create a general sense of injustice, while not acting in any wise as a deterrent. (C. M. A.)

none but himself are interested in, and in part upon such of his actions as may affect the happiness of those about him. In so far as his happiness depends upon the department of behaviour first mentioned, it is said, perhaps improperly, to depend upon his *duty to himself*; and the quality or disposition manifested in the discharge of the duty receives the name of *prudence*. In so far as his happiness, or that of others, depends upon such parts of his behaviour as may affect the interests of those about him, it may be said to depend upon his *duty to others*, or, as the phrase goes, his *duty towards his neighbour*. Now, there are two ways of consulting the happiness of other people: the one negative, by abstaining from diminishing it; the other positive, by striving to increase it. The first constitutes *probity*; the second, *beneficence*.

Duty  
towards  
others:  
involving  
*Probity* and  
*Beneficence*.

Upon all these three points ethics needs the aid of the law, but not in the same degree, nor in the same manner.

1. The rules of *Prudence* are almost always sufficient of themselves. If a man falls short in what concerns his own individual interests, it is his understanding, not his will, which is at fault; if he miscarries, it can only be through some mistake. The fear of causing hurt to oneself is a motive of repression sufficiently strong in itself; it would be idle to add thereto the fear of an artificial penalty.

Prudence.

But perhaps it will be said that hard facts prove the contrary: that excesses in gambling and drinking, and illicit commerce between the sexes, attended, as they so often are, by the gravest risks, show clearly enough that men have not always sufficient prudence to abstain from what they know to be injurious to themselves.

Legislation:  
how far  
necessary  
to enforce  
the dictates  
of Pru-  
dence.

Confining myself to an answer in general terms, I remark that, in most of these cases, the penalty would be so easy to elude that it would prove inefficacious; and, secondly, that the evil produced by the penal law would be much greater than that produced by the original fault.

Drunken-  
ness and  
Fornica-  
tion.

Suppose, for example, that a legislator should fancy himself on safe ground in attempting, by direct laws, to get rid altogether of drunkenness and fornication. He would have to begin by making a vast number of regulations; and thus there would arise a first and very grave inconvenience in the complexity of the laws. Again, the easier it is to conceal these vices, the greater the necessity for severe penalties to outweigh, by the drastic treatment of evil-doers, an ever-recurring hope of impunity; and thus we have a second inconvenience, not less grave, in the excessive rigour of the laws. Moreover, the difficulty of procuring evidence would be so great that it would be necessary to encourage informers and to maintain an army of inspectors; and thus we have a third inconvenience, surpassing either of the others, in this necessity for espionage.

Now, let us contrast the effects, good and bad. Offences of this nature (if we can properly apply the term 'offence' to a simple indiscretion) do not give rise to any alarm; but the projected remedy would create general dismay. Every man, guilty or innocent, would be in fear for himself or for his family. Suspicions and accusations would make it perilous to associate with one's fellows; a man would shun society and live the life of a recluse, dreading the consequences of some confidential disclosure. Instead of suppressing one vice, the law would have sown the seeds of new and more deadly vices.

It is true that certain excesses may become contagious by force of example; and that a mischief, almost imperceptible when it affects only a small body of persons, may, if its influence spreads, become of serious import. All that the legislator can do against offences of this nature is to subject them, in cases of notoriety, to censure or some slight penalty, such as will suffice to cover them with a taint of illegality, and so excite against them the popular sanction.

Legislation  
apt to go  
too far in  
this respect.

It is in matters of this kind that legislators have been disposed to carry their interference too far. Instead of



trusting to the prudence of the individual, they have treated man like a child or a slave. They have surrendered themselves to the same passion that has obsessed the founders of certain religious orders, who (the better to mark their authority, or perhaps from smallness of mind) have held their followers in most abject dependence, and sketched out for them their daily and hourly occupations, dictating the character of their food, the time for getting up and going to bed, and, indeed, every petty detail of life. There are famous codes in which may be found countless trammels of this sort: idle restraints upon marriage; penalties directed against celibacy; sumptuary laws controlling fashions in dress, the cost of feasts, the furnishing of houses, and the adornment of women. These codes are cumbered with details as to forbidden foods and drinks, ablutions and purifications demanded by health or cleanliness; with a thousand like puerilities such as add to all the inconveniences of useless restraint, that of befooling the people, by covering these follies with a veil of mystery in order to conceal their actual absurdity.

Still more unfortunate are the States in which it has been sought, by penal laws, to maintain uniformity of religious opinion. The choice of religion ought to be left entirely to the discretion of the individual. If he is persuaded that his eternal happiness depends upon a certain form of worship or some particular belief, what can a legislator set against so great an interest? I have no need to insist upon this truth; it is generally acknowledged. But, in defining the limits of legislation, I cannot ignore those which it is most important not to overstep.

If I may lay down a general rule, it is this:—leave to the individual the greatest possible latitude in all cases where he can injure no one but himself, for he is the best judge of his own interests. If he makes a mistake, we may presume that, when he finds it out, he will no longer persist in it. Let the authority of the law be interposed only to prevent him

Particu-  
larly in  
matters of  
religion.

✓  
General  
Rule.



from injuring his neighbour. It is in this regard that law becomes necessary, and the application of punishments proves really useful ; for, in such case, the rigour exercised against an individual makes for the security of the whole community.

Probity.

2. There exists, it is true, a natural connection between *Probity* and *Prudence* ; that is to say, our own interest, properly understood, will never leave us without a motive for abstaining from injuring our fellows.

Let us at this stage pause for a moment. I say that, quite apart from law and religion, we have always some natural motive, some motive springing from our own personal and direct interest, for consulting the happiness of our neighbours. (1) There is the motive of pure benevolence, a sweet and soothing sentiment such as we love to experience, and one which fills us with loathing for him who would wilfully cause pain. (2) The motive of private affection, which holds sway in domestic life and in the special circle of our family ties. (3) The desire to be of good fame and the fear of ill-repute. This last is a sort of calculation, and smacks of commerce : it is like paying one's debts in order to obtain credit, speaking the truth to gain confidence, serving to secure service in return.

Honesty is  
the best  
policy.

It is with some such meaning as this that a famous wit used to say that, if there were no such thing as honesty in existence, it would be worth while to invent it as a means of making one's fortune.

A man who knew his own real interests would never engage in crime, not even in crime concealed from his fellow-men. There would be the fear of contracting a shameful habit which, sooner or later, would betray him ; and the knowledge that secrets, which it is sought to hide from the searching scrutiny of the world, will create a sense of unrest such as taints the source of every joy. Whatever we may gain at the expense of the feeling of security is nothing worth ; and, if a man would preserve the respect

of his fellows, the best assurance he can have is the jealous maintenance of respect for himself.

But, in order that a man may be fully sensible of this bond between his own interest and that of his neighbour, he needs an enlightened mind and a heart free from corrupting passions. Most of us have neither sufficient understanding, nor sufficient strength of character, nor sufficient moral sensibility, to render the aid of the law wholly unnecessary to the maintenance of probity of conduct. The legislator must, then, supplement the weakness of this natural interest by adding thereto some artificial interest more appreciable and more uniform.

More still. In many cases ethics owes its existence to the law; that is to say, in order to determine whether a given action is morally good or bad, we must know whether it is permitted or forbidden by law. For example, this is true of what concerns property. A particular method of selling or acquiring, which is accounted dishonest in one country, may be deemed beyond reproach in another. It is the same in regard to offences against the State. The State owes its existence to legislation, so that one cannot dogmatize as to ethical duties until one has acquainted oneself with the enactments of the Legislature. There are, for example, countries where it is an offence to enter the service of a foreign power, and others in which such service is regarded as lawful and honourable.<sup>1</sup>

Ethics is  
in part  
dependent  
upon Law

3. As to *Beneficence*, some distinctions are necessary. The law might be extended to cover general objects, such as the care of the poor, etc.; but, so far as details are con-

Benefi-  
cence.

<sup>1</sup> Here we touch upon a question of the utmost difficulty. If the law is not what it ought to be, if it openly contravenes the principle of utility, ought we to obey it? ought we to infringe it? ought we to remain neutral between a law which ordains an evil and ethics which forbids it? The solution of the problem involves considerations alike of prudence and of regard for others. We ought to ascertain whether there is more danger in obeying the law or in violating it; whether the probable mischief of obedience is less or greater than the probable mischief of disobedience (Dumont).

cerned, the rules of beneficence must necessarily be abandoned in great measure to the jurisdiction of private ethics. Beneficence is, so to speak, invested with an air of mystery, and operates upon evils so hidden or unexpected that the law could not reach them. Moreover, it is to the free-will of the individual that beneficence owes its efficacy. If acts regarded as beneficent had been performed under constraint, they would have ceased to be beneficent acts; they would have lost their attractiveness, nay, their essential characteristic. It is ethics, and especially religion, which here supplies the necessary complement to legislation, and creates the most charming of all the ties that bind men together.

Extension  
of law in  
compliance  
with dic-  
tates of  
beneficence.

So far, however, from extending the law too widely, legislators have not, in this regard, gone far enough. They ought to have made it an offence to refuse or omit to perform a service of humanity which it is easy to render, in case any mischief is likely to result from such refusal or neglect.<sup>1</sup> For example, leaving to his fate a man who lies wounded on a lonely road, without seeking any assistance for him; not warning an ignorant man who is meddling with poisons; not stretching out one's hand to a man who has fallen into a ditch from which he cannot get out: in these and other similar cases, could any fault be found with a punishment which was confined to exposing the delinquent to some measure of shame, or to making his property answerable for any mischief which he might have averted?

Improper  
neglect of  
the inter-  
ests of the  
inferior  
animals.

I will remark, also, that legislation might well have gone farther than it has done in the interests of the inferior animals. I do not approve the laws made by the followers of the Gentoo religion on this subject. There are good reasons why animals should be made to serve for the sus-

<sup>1</sup> Cf. A. H. Clough's 'Latest Decalogue': *Poems*, edition of 1895, p. 184:

'Thou shalt not kill; but need'st not strive  
Officiously to keep alive.'—(C. M. A.)

tenance of man, and why such as molest us should be destroyed. We are the better for it, and they are none the worse ; for they have not, like us, distressing and long-protracted anticipations of future misery, while the death they suffer at our hands may always prove less painful than that which would await them in the inevitable course of Nature. But what can be said to justify the wanton torments they are made to undergo, the capricious cruelties which are practised upon them ?<sup>1</sup>

Among the many reasons I could give for making meaningless cruelty criminal, I confine myself to the one which immediately appertains to my subject.

Such an amendment of the law would tend to foster a general sentiment of benevolence and to soften men's hearts ; or, at any rate, to check that ever-deepening and brutal depravity which, after gloating over the sufferings of the animal creation, would fain be glutted with the writhings of human agony.<sup>2</sup>

<sup>1</sup> Cf. *Introduction to the Principles of Morals and Legislation*, chap. xvii., (4), note : 'A full-grown horse or dog is beyond comparison a more rational, as well as a more conversable, animal than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail ? The question is not, Can they reason ? nor, Can they talk ? but, Can they suffer ?' (C. M. A.)

<sup>2</sup> See *Barrow's Voyage to the Cape of Good Hope* for the cruelties of the Dutch settlers towards cattle and slaves (Dumont). *Quære : Travels in South Africa* by John Barrow (1764-1848), published in London 1797-1798. (C. M. A.)



## CHAPTER XIII.

### FALSE METHODS OF REASONING IN MATTERS PERTAINING TO LEGISLATION.

Reasons for  
making a  
law.

THE object of this Introduction has been to give a clear idea of the Principle of Utility and of the method of reasoning which conforms with that principle; and, as a result, we have a system of legislative logic that may be summed up in very few words. What is meant by giving a *good reason* for the making of a law? It is putting forward the good or evil which the law tends to produce: so much good, so many arguments in its favour; so much evil, so many arguments against it. But we must never forget that good and evil are nothing else than pleasures and pains.

What is meant by giving a *false reason*? It is putting forward, for or against a law, something other than its good or evil effects, as the case may be.

'Utility.'

Nothing could be more simple, and yet nothing is more novel. It is not the Principle of Utility which is new; that is necessarily as old as the human race. All the truth there is in ethics, all the good there is in laws, emanates from it; but the principle has often been followed instinctively, while at the same time its validity has been challenged in argument. If, in works on legislation, it chances, here and there, to throw out sparks, they are quickly extinguished in the surrounding smoke. Beccaria<sup>1</sup> is the only writer

<sup>1</sup> Marquis Beccaria's *Essay on Crimes and Punishments* (1764) was translated from the Italian into English, and published, with the Commentary by Voltaire, in several editions. The 1st in 1767; the 4th in 1785; the 5th in 1804. (C. M. A.)

who deserves to be noted as an exception ; and even in his book there are arguments which rest on false reasoning.

It is two thousand years or more since Aristotle undertook to prepare a complete catalogue of the various kinds of false reasoning, which he called *Sophisms*. If that catalogue were supplemented and improved in the light of knowledge acquired during succeeding ages, it might well find a place in my treatise ; but such a task would carry me too far. I shall content myself with exposing some of the principal errors which prevail in matters of legislation ; and in that way the principle of Utility will shine forth all the more brightly by reason of the contrast that will be drawn.

1. *Antiquity of the Law is not a Reason.*—The antiquity of a law may serve to create a prejudice in its favour ; but of itself antiquity is no reason.<sup>1</sup> If the particular law has conduced to the happiness of the community, the older it is the easier will it be to make manifest its good effects, and, so, establish its utility by a direct process. Antiquity of law.

2. *The Authority of Religion is not a Reason.*—This method of reasoning is rarely employed nowadays, though for a long period it prevailed extensively. Algernon Sidney's work abounds with quotations from the Old Testament, wherein he finds the basis of democracy as Bossuet had found the sources of autocracy.<sup>2</sup> Sidney sought to fight the partisans of divine right and passive obedience with their own weapons. If we suppose that a law emanates from the Deity, we suppose that it emanates from Perfect Wisdom and Loving-kindness. Such a law could, therefore, have no object other than the highest utility ; and it is this same utility which should always be put forward to establish the justice of the law. Authority of Religion.

<sup>1</sup> 'C'est un adage benthamique qu' "antiquité de la loi n'est pas raison"' (Halévy, i. 135). (C. M. A.)

<sup>2</sup> Sidney was born in 1622, and executed in 1683. His *Discourses concerning Government* was first printed in 1698 (cf. Hallam's *Literature of Europe*, iv. 201). (C. M. A.)

Dread of  
'Innovation.'

3. *An Accusation of Innovation is not a Reason.*—To condemn all change is to condemn all progress. Where should we have been if that principle had been followed up to the present time? Everything which exists must have had a beginning, so that everything which is now an 'institution' must once have been an 'innovation.' Those very persons who to-day applaud the law as 'ancient' would in olden time have condemned it as 'new-fangled.'

Arbitrary  
Definition.

4. *An Arbitrary Definition is not a Reason.*—Nothing is commoner among Jurists and Political Writers than to base arguments, and even to elaborate long books, on the strength of purely arbitrary definitions. This artifice consists in taking a word in a particular sense, quite different from the one given to it in ordinary parlance, using it as no one has ever used it before, and, so, baffling the reader by a show of depth and mystery.

Definition  
of 'law.'

Even Montesquieu himself fell into this fault at the very beginning of his work.<sup>1</sup> Seeking to give a definition of law, he passes from metaphor to metaphor, and brings together the most incongruous objects: the Deity, the material world, superior intelligences, beasts, and mankind. At last we learn that *laws are relations—eternal relations*: so that his definition is more obscure than the thing he set out to define. The word *law*, in its ordinary sense, suggests to every mind a tolerably clear idea; the word *relation* suggests no idea at all. The word *law*, in its figurative sense, suggests nothing but ambiguities; and Montesquieu, instead of dispelling the obscurity, managed only to intensify it.

It is characteristic of a false definition that it can only be employed in a particular way; so that this writer, a little farther on (chap. iii.), has to give another definition of law: '*In general terms,*' said he, '*law is human reason in so far as it governs all the peoples of the earth.*' These phrases are

<sup>1</sup> Chapter i., 'Of the Relation of Laws to Different Beings' (translation of *L'Esprit des Lois*, by Nugent, 1823, vol. i., p. 1). (C. M. A.)

more familiar, but they do not connote any clearer idea. Are we to take it that laws, which are so often found conflicting, cruel, or ridiculous, and in a state of constant change, are nevertheless always 'human reason'? It seems to me that reason, so far from being the same thing as law, is frequently opposed to it.

Definition  
of 'law'—  
contd.

This first chapter of Montesquieu has been responsible for a good deal of balderdash. People have racked their brains in search of metaphysical mysteries where none in fact existed. Even Beccaria<sup>1</sup> allowed himself to be carried away by this obscure notion about *relations*. He says that to interrogate a man for the purpose of ascertaining whether he is guilty or innocent is, in effect, to compel him to accuse himself. Such a proceeding shocks him, and why? Because, forsooth, it is *confounding all the relations*. Now, what does that mean? To enjoy, to suffer, to cause enjoyment, to cause suffering—all these are expressions of which I know the meaning. But to comply with 'relations,' to confound 'relations,' is what I do not understand at all. These abstract terms connote no idea in my mind, awaken no sentiment in my breast. I am absolutely indifferent to 'relations'; *good and evil, pleasures and pains*, are what interest me.

Rousseau was not satisfied with Montesquieu's definition; he gave one of his own which he proclaimed as a great discovery. '*Law*,' said he, '*is the expression of the general will.*' There is, then, no law at all where the people, as a body, have not spoken; there is no law except in an absolute democracy. By this supreme decree, this 'last word,' so to speak, Rousseau has suppressed all existing laws: he has, indeed, annulled, in advance, all those which may hereafter be made by any of the nations upon earth, except perhaps in the republic of San Marino.

5. *Metaphors are not Reasons*.—I here intend either a Metaphors, metaphor properly so called, or an allegory, which, serving

<sup>1</sup> *Crimes and Punishments*, chap. xvi.: edition of 1804, p. 56. (C. M. A.)



Metaphors—*contd.*—at first to illustrate or adorn, comes by degrees to be treated as the basis of an argument.

Blackstone, a man so hostile to any kind of reform that he even condemned the introduction of the English language into the Law Reports, neglected nothing which was likely to instil the same prejudice into his readers' minds. He represents the law as a castle or fortress which would be weakened by any change in its structure.<sup>1</sup> I agree that he does not use this metaphor as an argument, but why does he employ it at all? To seize hold of the imagination; to prejudice his readers against any suggestion of reform; to cultivate a sort of instinctive dread of every legal innovation. The metaphor leaves on the mind a false impression, which produces an effect like that produced by a false argument. He should, however, have reflected that the allegory might be turned against him.

When he makes a castle of the law, is it not natural for ruined suitors to represent it as peopled with harpies?

There is a saying that an Englishman's house is his castle. But a poetical adage is not a reason; for if a man's house is his castle by night, why should it not be so by day? If it is a sanctuary for its owner, why should it not be a sanctuary for everyone whom he chooses to harbour? In England this childish notion of liberty has at times obstructed the due course of justice. It seems that criminals, like foxes, are to be allowed to have their burrows for the better sport of the huntsmen.<sup>2</sup>

In Catholic countries a church is the *House of God*, a metaphor which has served to establish many an asylum for

<sup>1</sup> This seems to refer to a fine passage in book iii., chap. xvii.: 'Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.' (C. M. A.)

<sup>2</sup> *I.e.*, 'The lawyers by and for whom the hunt is made' (*cf.* Bowring, vol. ii., p. 511). (C. M. A.)

criminals. The forcible seizure of those who sought refuge in his house would mark a want of respect for the Deity.<sup>1</sup>

The *balance of trade* is a metaphor which has occasioned a vast amount of discussion. It has been supposed that, in the interchange of trade, nations rise and fall like the scale-pans of a balance, loaded with unequal weights; and people have been terribly disturbed by what they regarded as a want of equilibrium. They have imagined that what one nation lost the other must have gained, as though a weight had been taken from one scale-pan and placed in the other.

So, too, the phrase *mother-country* has given birth to a great number of prejudices and false arguments in all questions concerning the colonies and a parent State. Duties have been imposed upon colonies, and crimes have been imputed to them, all based on this metaphor of filial dependence.

6. *A Fiction is not a Reason.*<sup>2</sup>—I understand by ‘fiction’ Fictions an assumed fact notoriously false, which is reasoned upon as though it were true. The celebrated Coccéji,<sup>3</sup> compiler of the *Code Frederic*, supplies an example of this form of reasoning when dealing with the topic of Wills. After a good deal of beating about the bush on the subject of

<sup>1</sup> ‘The piety or superstition of some nations has determined that a criminal cannot be arrested in a place of worship. This is the whole fact: the usage is neither explained nor convicted of absurdity by saying that such people call a church the House of God. If it were the House of God, does Mr. Bentham conceive that it *ought* to be a sanctuary for criminals?’ Such was the comment of the *Edinburgh Review* (vol. iv., p. 19) on this passage. (C. M. A.)

<sup>2</sup> ‘Fictions are mighty pretty things. Locke admires them; the author of the Commentaries adores them; most lawyers are, even yet, well pleased with them’ (Bentham’s *Common-Place Book*, 1774-75). (C. M. A.)

<sup>3</sup> Samuel (son of Henri) Coccéji, the German jurist, was born in 1679, and died in 1755. The Code, prepared under the guidance of Coccéji, was translated into French by de Campagne, and published under the title of the *Code Frederic* (1751-1753, 3 vols., 8vo.). The Emperor afterwards directed the compilation of another code on the basis of that of Coccéji. It was prepared by Von Kramer with the assistance of Suarez, but did not come into operation until 1794, after the death of Frederic. (C. M. A.)

natural rights, he comes to the conclusion that a legislator ought to confer on the individual power to make a will. Now, why ? Because, forsooth, ' the heir and the deceased are really one and the same person, and consequently the heir ought, as of right, to continue to enjoy the property of the deceased ' (*Code Frederic*, part. ii., l. 110, p. 156). It is true that he presents some arguments which are, more or less, based on the doctrine of Utility; but that is only in some introductory remarks in the preface. The serious reason, the judicial reason, consists in the identity of the living with the dead.<sup>1</sup>

Corruption  
of blood.

English Jurists, in order to justify in certain cases the forfeiture of property, have made use of reasoning very like that employed by the Chancellor of the great Frederic. They have imagined a *corruption of blood* which stops the course of legal succession. A man, we will suppose, has been executed for the crime of high-treason. His innocent son is not only deprived of his father's property, but he cannot even inherit an estate from his grandfather, because the channel through which the property would pass has been tainted or corrupted.<sup>2</sup> This fiction of a sort of political original sin serves as the foundation of the whole of the law on this matter. But why stop there ? If there is really a corruption of blood, why do they not get rid altogether of these base offshoots of a criminal stock ?

Royal at-  
tributes.

In the seventh chapter of his first book, Blackstone, speaking of the royal authority, has abandoned himself completely to the puerility of fictions. The King has Attributes; he is present everywhere, he can do no wrong, he never dies. These preposterous paradoxes, begotten of servility, far from conveying more correct conceptions

<sup>1</sup> ' It is but a pithy way of intimating that he is bound in all the obligations, and entitled to all the rights, of his predecessor ' (*Edinburgh Review*, vol. iv., p. 19). (C. M. A.)

<sup>2</sup> That is, he is made to lose the chance he had of succeeding to his grandfather, brother, or paternal uncle, because no title could be deduced through the corrupt blood of the father (*cf.* Bowring, vol. i., p. 480). (C. M. A.)



of the royal prerogative, only serve to dazzle, to mislead, to give to reality itself an air of fable and of portent.

Nor is all this a mere play of fancy : it is on such fictions as these that Blackstone bases the greater part of his reasoning. He uses them to explain certain royal prerogatives, which might be supported on very sufficient grounds, without perceiving that a man damages even the best of causes when he seeks to uphold it by worthless arguments. Again, he tells us that ‘ the Judges are the mirror by which the King’s image is reflected.’<sup>1</sup> What childish folly ! Is not this exposing to ridicule the very objects he designs to cover with glory ?

But there are bolder and more important fictions which have played a great part in politics. They have given rise to famous books, and relate to supposed *Contracts*. The *Leviathan* of Hobbes<sup>2</sup> (nowadays but little read, and freely disparaged by those who have not read it as an apology for despotism) assumes as the sole basis of political society a pretended contract between the Sovereign and his people. By this contract the people have, it seems, renounced the liberty bestowed on them by Nature, which produced nothing but evil consequences, and have reposed supreme authority in the hands of their Prince. Wills, however conflicting, are in his breast reconciled in complete agreement, or, rather, are there annihilated: what *he wills* is accounted as the will of each and all of his subjects. When David compassed the death of Uriah, he was acting with Uriah’s consent, inasmuch as Uriah had consented to everything that David might command of him. According to this system, the monarch might, we suppose, sin against God, but he could not sin against men, for they had given consent, in advance, to anything that he might please to do. It was impossible to harbour a thought of resistance, for

Pretended  
contract  
between  
Sovereign  
and People.

<sup>1</sup> *Commentaries*, book, i., chap. vii. (C. M. A.)

<sup>2</sup> Born 1588, died 1679. The *Leviathan* was printed in London, and published in 1651. (C. M. A.)



that would involve the incongruous idea of resisting oneself. Locke,<sup>1</sup> whose name, to the partisans of Liberty, is as dear as that of Hobbes is odious, has, in like manner, rested the basis of Government on a contract. He asserts the existence of a contract between Prince and People, whereby the Prince undertakes to govern according to certain laws in a manner subservient to the general happiness; while the People, on their side, undertake to obey so long as the Prince remains faithful to the terms and conditions on which he received the crown.

The Social  
Contract.

Rousseau indignantly rejected the notion of a bilateral contract between Prince and People. He would have none of it. He conceived, as the only legitimate basis of Government, a Social Contract whereby everybody binds himself to everybody else: according to him, the very existence of Society depends upon this voluntary agreement of partnership.

In each of these three systems of political theory, the whole fabric is based on a fiction; and that is the only factor common to systems which in every other respect are in direct conflict. The three contracts are all equally fictitious; they exist only in the imagination of their authors. Not only is there no trace of any one of them to be found in history: from all directions abundant evidence is forthcoming to negative their existence. The allegation of Hobbes is a manifest untruth, for despotism has everywhere taken its rise in violence and false notions of religion. If there ever were a nation who, by public accord, entrusted their chief with supreme authority, it is not true that the people proclaimed themselves ready to submit to all the caprices of their Sovereign, however cruel or whimsical they might be. The strange Act which secured the assent of the people of Denmark in 1660 comprises highly im-

<sup>1</sup> John Locke (1632-1704). His two *Treatises on Civil Government* were published in 1689-1690. (C. M. A.)

portant clauses limiting the supreme power.<sup>1</sup> The Social Contract of Rousseau has not been subject to such severe criticism, because men are not very particular about the logic of a system which sets up all they love best, Liberty and Equality. But where was this universal agreement made? What are its terms? In what language is it to be found? Why was it left unnoticed? Can it be that, when they forsook the woods and renounced savagery, men conceived the noble ideas of morals and politics upon which this primitive convention was based? The contract of Locke is more specious, because there are, in point of fact, some monarchies in which the Sovereign gives certain undertakings on his accession to the throne, and makes certain stipulations with the nation he is about to rule. Yet, for all that, the alleged contract is only a fiction. The essence of a contract lies in the free consent of the parties concerned, while all the objects of the engagement must be known and specified. But, although the Prince may, at his accession, be free to accept or to refuse, are the People equally so? Can a few vague acclamations really be accounted an act of individual and universal consent? Can such a contract really bind the multitude of individuals who never heard of it, who were never summoned to ratify it, who could not have refused assent without risking their lives and their estates? Moreover, in most monarchies, the alleged contract has not, indeed, this faint appearance of reality; there is not even a pretence of any engagement between Prince and People.

Now, there is no need to rest the happiness of mankind on a fiction, to build the social pyramid on a foundation of sand or crumbling clay. Let us leave gewgaws to children: men should speak the language of soberness and truth.

<sup>1</sup> In 1660, during the reign of Frederick III., the crown of Denmark was made hereditary and the whole government was placed under royal control. On the accession of Frederick VII., in 1848, a less autocratic constitution was adopted. (C. M. A.)

No need  
for such  
fictions

The true bond in politics lies in the vast interest we all have in maintaining a stable form of government. Without government there can be neither security, family life, property, nor industry. And herein we must seek the basis and rationale of all governments whatever may be their form or origin. It is by regarding a government in the light of the aims which it has in view that we can reason soundly upon its rights and obligations, without having recourse to pretended contracts which can only serve to beget endless disputation.

'Fantastic  
Reasons.'

7. *A Fanciful Reason is no Reason.*—Nothing is more common than to say, Reason and Good Sense require this, or Eternal Reason dictates that, and so on. But what is this Reason? If it is not a consideration manifestly based on good or evil, pleasure or pain, it is a mere fancy, a piece of despotism which proclaims nothing but some inner persuasion of the speaker. Let us see upon what foundation a famous Jurist has sought to rest the authority of a father. A man of average good sense would find no difficulty in such a matter, but your man of learning must discover a mystery in everything.

Paternal  
Rights.

'The right of a father over his children,' says the jurist Coccéiji,<sup>1</sup> 'is founded on reason, because (α) the children are born in a house of which the father is master; (β) they are born in a family of which he is the head; and (γ) they spring from his seed and become part of his body.' Such are the reasons from which he concludes, amongst other things, that a man of forty ought not to marry without the consent of an elderly gentleman who may be in his dotage. The common factor of these reasons is that not one of them has any relation to the interests of the parties concerned: the author pays no regard either to the welfare of the father or to that of his children. Such reasons are altogether unworthy of a man who devoted his whole life to the study of law.

In the first place, 'the right of a father' is an inaccurate

<sup>1</sup> See note *ante*, p. 93. (C. M. A.)

expression. We are not dealing with an unlimited or indivisible right: there are several kinds of rights which might be granted or refused to a father, on special grounds connected with the particular right. Paternal Rights—*contd.*

The first reason alleged by Coccéiji is founded upon a fact which may or may not be true. It is a matter of chance. Suppose a traveller has a child born in a hostelry, on board ship, or in a friend's house, he would lack the first basis of paternal authority. The children of a man-servant, or of a soldier, ought not, I suppose, to obey their father, but the proprietor of the house where they happen to be born.

The second reason either has no determinate meaning, or is a mere repetition of the first. Is the child of a man who dwells in his father's house, or in that of his elder brother or guardian, born in a family of which his father is the head?

The third reason is as lacking in good sense as in good taste. 'The child is born of the father's seed, and becomes part of his body.' If this can form the basis of a right, it would indisputably place the power of the mother far above that of the father.

We should here note an essential distinction between these false principles and the true one. The principle of Utility, being directed only to the interests of the parties, adapts itself to circumstances, and may be adjusted to meet all requirements. These false principles, having no relation to individual interests, would be absolutely inflexible—if, indeed, they were consistently applied.

Of this rigid character is the pretended right founded upon birth. The son naturally belongs to his father, because the original elements of which the son is formed once coursed through the father's veins. No matter that he makes his son wretched: the right cannot be annulled, because the son cannot be other than his son. The corn which has gone to constitute your body formerly grew in my field: can it be that you are not my slave?



Sympathy  
and  
Antipathy.

8. *Sympathy and Antipathy are not Reasons.*—False reasoning by antipathy is very common in subjects connected with penal law. We conceive antipathy against deeds reputed to be crimes, against individuals reputed to be criminals, against Ministers of Justice, against particular forms of punishment. This false principle has, indeed, reigned, with every circumstance of tyranny, throughout the vast province of penal law. Beccaria was the first to venture on a frontal attack, and his weapons are of a temper that time cannot destroy; but, though he went far towards dethroning the usurper, he did too little towards providing a suitable successor.<sup>1</sup>

Actions  
said to  
'deserve'  
punishment  
or reward.

It is this principle of antipathy which leads us to speak of an offence as one 'deserving' punishment; while it is the correlative principle of sympathy which leads us to speak of an action as 'deserving' reward. Now, this word 'deserve' simply involves us in confusion and angry disputes; it is the 'effects,' good or bad, which alone we ought to consider.<sup>2</sup>

National  
and popu-  
lar prej-  
udices.

But when I say that antipathies and sympathies are not reasons, I refer to those of the legislator; for the antipathies and sympathies of a people may furnish reasons, and very powerful ones. No matter that religions, laws, and customs, are harmful or capricious; it is enough that the people are attached to them. The strength of the prejudice in their

<sup>1</sup> Cf. Maine's *Ancient Law*, Sir F. Pollock's edition of 1906, chap. x., p. 377 *et seq.* (C. M. A.)

<sup>2</sup> Even Montesquieu regarded it as obvious 'qu'un être intelligent qui a fait du mal à un être intelligent mérite de recevoir le même mal.' Bentham conceived three epochs in the progress of society: 'The first, which is past, in which every man, actuated by the vindictive principle, inflicted an arbitrary punishment for a received offence, more or less intense according to the greater or less violence of his passion. The second, which is present, in which, the Idea of a Public being formed and established, the supreme power in the State, taking the rod of vengeance out of the hand of the Individual, uses it according to settled rules, still governed, however, in great measure by the same principle. The third, which is yet to come, in which, all traces of the vindictive principle being entirely obliterated, Prevention shall be the sole end and object of a Penal Legislation' (MSS. University College, No. 96; cited Halévy, vol. i., p. 310). (C. M. A.)

favour supplies an exact measure of the regard to be paid to them. Taking away a joy or hope of a nature wholly delusive does as much mischief as taking away a joy or hope which is based on reality.

National  
and popu-  
lar preju-  
dices—  
*contd.*

The pain of a single individual may thus become by sympathy the pain of all; and hence flows a multitude of evils: antipathy against the law which conflicts with popular prejudice; antipathy against the whole body of laws of which it forms a part; antipathy against the government which carries the law into effect. There springs up at the same time a disposition not to assist in the execution of the laws; to resist them secretly, or even openly and with violence; to take away power from the hands of those who flout the express wishes of the people. Next comes the mischief flowing from countless offences which, taken in the mass, constitute that afflicting aggregate known as *rebellion* or *civil war*; and finally appears the long train of evils that follow on punishments inflicted for the purpose of quelling the uprising. Such is the chain of direful consequences that, in every age, attend a conflict with fancies and prejudices. The legislator must, therefore, give way before the mighty whirl of a current, strong enough to carry off everything that should obstruct its course. But we must not fail to note that in these circumstances it is not the fancies and prejudices themselves which are the determining factor with the legislator, it is the evils which threaten him in case those fancies and prejudices are thwarted.

Ought the legislator, then, to be a bonds slave to the prejudices of those whom he is supposed to govern? Certainly not. Between rash resistance and slavish concessions there lies a middle course, honourable and safe. That is to combat these prejudices with the only weapons that can prevail over them—example and instruction. He must enlighten the minds of the people, address himself to their understanding, and give time for error to be un-

Prejudices  
—*contd.*

masked. Sound reasons, if clearly expounded, must of necessity prove stronger than false ones. But the legislator, in pursuing this course, must not play too open a part, lest, perchance, an ignorant populace may misunderstand him. Indirect means will best serve his purpose.

I would, however, point out that it is a commoner fault to show undue deference to prejudice than to go to extremes in running counter to it. Some of the wisest legislative proposals are apt to be defeated by the trite objection: 'This project is contrary to the sentiments of the people; we shall set them against us if we carry it.' But how is all this known? What organ of public opinion has been consulted? Has the entire community one uniform way of thinking? Have all its individual members come to the same conclusion, including the 95 per cent. who never even heard of the project? Besides, if the people are in error, must they of necessity remain so for ever? Will not delusions which darkness has engendered vanish with awakening light? Could we expect the mob to grasp the true doctrine while it was as yet unrevealed to our law-givers and the legal pundits? Have we not set before us the example of other nations which have emerged from like darkness and triumphed over similar obstacles?

And after all, popular prejudice serves oftener as a pretext than as a real impelling cause or motive; it is a convenient passport for the use of statesmen when involved in scrapes begotten of their own folly. The ignorance of the people is a favourite argument advanced by sloth and cowardice, while the true motive is some prejudice which still clings to the statesmen themselves. The name of the people is forged with the intention of using it to justify their rulers.

9. *Begging the Question is not a Reason.*—*Petitio principii*, or begging the question, is one of the Sophisms illustrated by Aristotle; but it is a very Proteus, which artfully masks itself, and reappears in many a different guise.

Begging the question, or, rather, forcibly seizing the

Assump-  
tion of the  
points in  
dispute.



question, consists in assuming and making use of the very proposition under discussion, as though it were already proved. This false mode of reasoning creeps into Morals and Legislation under cover of *sentimental* or *impassioned* terms—that is, terms which, beyond their principal signification, convey an accessory idea of praise or blame.

Terms are spoken of as *neutral* when they simply describe the thing referred to, without involving any assumption of good or evil—that is to say, without importing any outside idea of praise or blame. Now, we must note that an ‘impassioned’ term suggests an assumption which is implied, though not expressed, and invariably accompanies the use of the word—may be without this being known to the man who uses it. The attribute thus implied is one importing praise or blame, but the implication is always vague and indefinite.

Sentimental and neutral terms.

Suppose I were to unite with the idea of utility some term which commonly conveys an accessory idea of blame; I should seem to be advancing a paradox and involving myself in a contradiction. Thus, if I were to say that such and such an object of ‘luxury’ is a good thing, the proposition would astound those who are wont to attach to this word ‘luxury’ a sentiment of disapproval. Now, how ought I to proceed to discuss the particular point without running the risk of awakening this association of ideas? I must have recourse to a neutral word: I might say, for example, such and such ‘a manner of spending one’s income’ is a good thing. This turn of expression does not run counter to any prejudice, and therefore allows of an impartial discussion of the proposition I wish to advance. When Helvetius suggested that *interest* was the real motive of every action, people were up in arms against him, without even taking the trouble to understand what he meant. Why was this? Because the word ‘interest’ has an odious connotation, a meaning commonly accepted such as would appear to exclude every motive of pure affection or goodwill. So, too, in politics, how many arguments rest



entirely on passion-kindling phrases ! People suppose they are giving a reason for a law when they say that it conforms with the 'principle' of monarchy or democracy, as the case may be. But this means nothing; for, while there are some who connect these words with accessory ideas of approval, others attach to them ideas of a contrary nature. Let the two sides get to close quarters, and the quarrel will never end except from weariness of strife; for, before we can even begin a real inquiry, we must calculate the precise effects of the proposed law in terms of good and evil.

The British  
Constitu-  
tion.

Blackstone calls upon us to admire the British Constitution as a combination of the three forms of Government, and concludes that it unites in itself all the good qualities of monarchy, aristocracy, and democracy.<sup>1</sup> How could he fail to perceive that, by precisely similar reasoning, he might have arrived at a diametrically opposite conclusion, and one to the full as legitimate—to wit, that the British Constitution unites in itself all the special vices of democracy, aristocracy, and monarchy ?

The word 'independence' is allied to accessory ideas of dignity and virtue: the word 'dependence' is allied to accessory ideas of inferiority and corruption. Accordingly, the panegyrists of the British Constitution belaud the 'independence' of the three powers to whom the Legislature of this kingdom is entrusted. This, in their eyes, constitutes a sort of political masterpiece, the most valuable feature in our form of government. On the other hand, those who would belittle this same Constitution fail not to insist upon the 'dependence' of one or other branch of power. Eulogy and censure are equally groundless.

To come to the region of fact, there is no real independence

<sup>1</sup> Bentham had dealt, in detail, with Blackstone's eulogy of the British Constitution in the *Fragment of Government*, which was published in 1776. See chap. iii. in Professor Montague's edition of 1891; or Bowring, vol. i., p. 277. In his own copy Bentham wrote: 'This was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom on the field of law.' (C. M. A.)

at all. Have not the King and most of the Lords a direct influence in the election of members of the House of Commons? Does not the King possess power to dissolve at a moment's notice—a power of no slight import? Does not the King exercise a direct influence by offices of profit and dignity, given and taken away again at pleasure? On the other hand, is not the King in dependence upon the two Chambers, and more particularly upon the House of Commons; since he could not support his position without money and troops—two vital matters wholly in the hands of the people's representatives? Is the House of Lords independent while the King can add to its numbers at will, and obtain a majority for himself by the creation of new peers? Does he not exercise influence, too, by the prospect of rank and advancement in the peerage, and by the elevation of ecclesiastics to the bench of Bishops?

Instead of basing arguments on a word, which may prove a mere instrument of deception, let us consider effects. Now, it is, really, the mutual dependence of these three powers which is responsible for their harmonious relations, makes it possible to subject them to definite rules, and enables them to adopt a systematic and ordered procedure. Hence the necessity for reciprocal respect, attention, concession, and conciliation! If they were completely independent of each other, there would be constant friction, and on occasion appeals to force, resulting in the establishment of absolute democracy, or, in other words, of anarchy.

I cannot refrain from giving two other examples of this form of fallacious reasoning, based upon the abuse of words. If we start an abstract political theory about National Representation, and study everything which seems to be a natural consequence of that abstract idea, we soon reach the conclusion that the right of 'universal suffrage' ought to be conceded; and, step by step, we establish to our own satisfaction that the representatives ought to be elected

Popular  
Represent-  
tation.

The 'suffrage' question.

as frequently as possible, so that the representation may fairly claim to be styled 'national.' But, submitting this matter to the test of utility, we do not argue about a word: we look only to effects.<sup>1</sup> When we are concerned with the election of a legislative assembly, we should extend the suffrage to those only whom, we have reason to suppose, the nation would be willing to entrust with that right. For a choice made by men who fail to secure the confidence of the nation at large would weaken the confidence of the nation in the assembly when chosen. Now, the men who would not enjoy the confidence of the nation in this regard are those who could not be assumed to possess political integrity, together with a sufficient amount of knowledge; and we could not assume the political integrity of those who might from want be driven to sell their votes, or who have no fixed abode, or who have been condemned by the courts for certain specified crimes. Nor could we assume the necessary degree of knowledge in the case of women, for their domestic engagements exclude them from the conduct of public affairs;<sup>2</sup> nor in the case of children or of adults beneath a certain age; nor in the case of those who, by poverty, are deprived of the rudiments of education, etc.

It is on such principles as these that we should lay down the conditions applicable to the franchise, without regard to considerations derived from abstract terms; and so, too,

<sup>1</sup> Cf. a letter to Mirabeau written by Bentham in 1789: 'The phrase "natural right" when opposed to utility is altogether an unmeaning one. To say to a Legislature acknowledged to be supreme: "You have no right to do so and so, although it would be of advantage to the State," is only another way of saying, "I don't like you should do so and so, though I cannot tell why." Arguments, however, must be accommodated not only to men's reason, but, in some instances, to what they are much more governed by, their prejudices and affections' (MSS. University College, No. 9; cited Halévy, vol. i., p. 364). (C. M. A.)

<sup>2</sup> In his plan of reform, discussed by the House of Commons in 1818, Bentham declared that he could find no reasons for the exclusion of women from the franchise, and observed that, strangely enough, those who, in support of such exclusion, gave a sneer or a laugh for a reason, found no objection to the vesting of absolute power in that sex and in a single hand (cf. Bowring, vol. iv., p. 568). (C. M. A.)



in weighing the advantages and disadvantages of frequency of election when we are dealing with the duration of legislative assemblies.

The last example I have to give is taken from *Contracts*. Pretended political contracts. I refer to the various political fictions imaged and presented under that title. When Locke or Rousseau argues about some alleged contract, and maintains that the contract, political or social as the case may be, comprises such and such a clause, can he prove it save by means of the general utility supposed to result from the particular clause? We will concede, if you will, that this same contract, which has not even been reduced into writing, is of full force and effect. Wherein does its strength lie? Is it not in its utility?

Why must we fulfil our engagements? Because trust in promises, that is, good faith, is the basis of society. It is for the advantage of the whole community that each individual member of it should keep his word. If engagements no longer retained any obligatory force, we must needs go back to the woods; for then there would be no security for mankind, no mutual trust, no commerce.

It is precisely the same with these political contracts: it is their utility which alone can give them binding force, and if they were to become mischievous, that force would be gone. If a King had sworn to bring misery upon his people, would his oath be valid? If the people undertook to yield obedience in all events, would they be bound to submit to ruin at the hands of a Nero or a Caligula, rather than break their word? If the effects of the supposed contract were altogether mischievous, would there be any sufficient reason for supporting its validity? No! it is beyond all cavil that this question of validity is at bottom one of utility—a little entangled, or, it may be, a little distorted, and so more susceptible of misinterpretation.

10. *Imaginary Law is no Reason—Natural Law, Natural Right.*—These two sorts of fiction or metaphor play so Law of nature.



Law of  
nature—  
contd.

conspicuous a part in works on Legislation as to deserve separate examination.<sup>1</sup> The original, and, indeed, the ordinary, meaning of the word 'law' is the expressed will of the legislator; while 'the law of nature' is a figurative expression, Nature being represented as a being to whom certain particular dispositions are attributed, which are called, figuratively, her 'law.' In this sense all such inclinations of mankind in general as seem to arise independently of organized communities, and must, therefore, precede the establishment of political or civil law, are spoken of as 'laws of nature.' That is the true meaning of the phrase, but not the one in which it is usually understood. Authors have interpreted it in a special sense, as though there were an actual code of these natural laws: they appeal to them, cite them, and set them in opposition, line by line, to the enactments of legislators. They do not seem to realize that these natural laws are the product of their own imagination; that they themselves are all at sixes and sevens about their assumed code; that they are driven to affirmation without proof, while there are as many different systems as there are writers on the subject. In reasoning after this fashion we are always having to start afresh; because, these laws being creatures of imagination, anyone may lay down what he pleases, and the discussion becomes interminable.

Sentiments of pleasure or pain, known as inclinations, are natural to man; but to call these sentiments or inclinations 'laws' is to import a false and dangerous idea. It is putting language in conflict with itself, for we have to make 'laws' for the express purpose of repressing these very inclinations; instead of treating them as laws, we have to bring them under the law, and it is against the strongest natural inclinations that it becomes necessary to enact the most repressive laws. If there chanced to be a law of nature which directed all men towards their

<sup>1</sup> Seldon, *e.g.*, maintained that Natural Law was *revealed* to the first human beings. (C. M. A.)

common weal, laws would be useless. To enact them would be like using a reed to prop up an oak, or kindling a torch to add to the light of the sun.<sup>1</sup>

Blackstone, speaking of the obligation of parents to provide maintenance for their children, says that this duty is 'a principle of natural law; an obligation, says Puffendorf, laid on them not only by Nature herself, but by their own proper act in bringing children into the world.' 'Montesquieu,' he adds, 'has a very just observation upon this head: That the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation.'<sup>2</sup> Parents 'are inclined' to bring up their children; parents 'ought' to bring up their children: these are distinct propositions. The first does not assume or involve the second; the second does not assume or involve the first. There are, doubtless, very strong reasons for imposing on parents the obligation of supporting their children. Why do not Blackstone and Montesquieu give them? Why do they refer to what they call 'the law of nature'? What is this law of nature which stands in need of a secondary law to make it effective? If this natural obligation really exists, as Montesquieu asserts, far from serving as the foundation of marriage, it proves its uselessness, at any rate, for the purpose which he assigns. One of the very objects of marriage is, indeed, to supplement natural affection, and to convert into a positive obligation the mere inclination of parents, which might not always prove sufficiently strong to outweigh the cost and inconvenience of providing suitable education. Men are

Natural  
obligations  
of parents.

<sup>1</sup> Cf. Hume, *Treatise*, bk. ii., pt. ii., s. ii. (Green's ed., vol. ii., pp. 268, 269). 'If men pursued the public interest naturally, and with a hearty affection, they would never have dreamed of restraining each other by these rules; and, if they pursued their own interest, without any precaution, they would run headlong into every kind of injustice and violence' (cited Halévy's *Jeunesse de Bentham*, p. 304). (C. M. A.)

<sup>2</sup> Blackstone's *Commentaries*, book i., chap. xvi., sect. i. (C. M. A.)

quite ready to make provision for their own maintenance: no laws have been needed to enforce this duty. If the disposition of parents to provide for the maintenance of their children were equally strong at all times and in all circumstances, it would never have occurred to the Legislature to impose the obligation of support. The exposure of children, so common among the ancient Greeks, is still commoner in China; and, to make an end to this practice, would it not be necessary to put forward reasons other than this pretended law of nature, which is evidently at fault?

Natural  
'rights.'

So, too, the word 'right,' like the word 'law,' has both a proper meaning and a metaphorical meaning. 'Right,' properly so called, is the creature of 'law,' properly so called: real laws beget real rights. 'Natural right' is the creature of 'natural law': it is a metaphor which takes its origin in another metaphor. It is certain expedients or faculties which are natural to men; but to call them 'natural rights' is again to put language in conflict with itself, for 'rights' are established to assure the free exercise of expedients or faculties. The right is the guarantee, the faculty is the thing guaranteed. How can we make ourselves understood in a tongue which confounds, under the same terms, things so distinct? What would become of the nomenclature of arts if we were to give to the craft whereby a piece of work is produced the same name as is given to the article manufactured? 'Real rights' is a phrase that imports some legal signification, while 'natural rights' is a phrase often used in a sense which is, so to speak, anti-legal. When, for example, we say that 'the law cannot contravene natural rights,' the word 'rights' is used in a sense above the law; for we imply that there may be rights which assail, overthrow, or even annul, the law. In this anti-legal sense, the word is a deadly foe alike to good government and to good sense. There is no reasoning with fanatics, armed with 'natural rights' which every man interprets as he pleases and applies as he thinks



fit. These 'rights' are, it seems, as inflexible as they are <sup>Natural 'rights'—</sup> unintelligible; not a jot may be given up or curtailed; they <sup>contd.</sup> are to be accounted sacred dogmas from which it is a crime to recede. Instead of judging laws by their effects, instead of classing them as good or bad, these fanatics consider them in their relation to pretended natural rights; in other words, they substitute, for arguments based on experience, chimæras of their own imagining. And this is no harmless vagary: theory ripens into practice. 'It is the laws that accord with nature we must obey; all others are, of necessity, null and void, and, instead of obeying, we must resist them. The moment natural rights are assailed, every good citizen will rise in their defence. These self-evident rights stand in no need of proof; it is sufficient to declare them. Why prove what is evident? The mere doubt suggests a want of good sense or a vicious heart,' etc. That I may not be charged with putting these seditious maxims into the mouths of this type of inspired politician without good reason, I will cite an apposite passage from Blackstone; and I choose him because he is, of all writers, the one who has shown the most profound respect for the authority of governments.

Speaking of these pretended laws of nature and of the law of revelation, he says: 'No human laws should be suffered to contradict these. . . . If any human law should allow or enjoin us to commit it (*i.e.*, murder), we are bound to transgress that human law, or else we must offend both the natural and the divine.'<sup>1</sup> Is not this putting into the hands of every fanatic arms that he can use against all governments? In the immense variety of conceptions as to natural law and divine law, will not anyone be able to discover some reason or other for resisting every human law? Could any State subsist for a single day if everybody fancied himself in private duty bound to resist the laws unless they happened to conform with his particular

<sup>1</sup> Blackstone's *Commentaries*, vol. i., Introduction, § 2. (C. M. A.)



Natural  
'rights',—  
contd.

views of the laws of nature and the law of revelation? The expositors of Nature's code and the various religious sects would soon be at one another's throats in right good earnest!

'The pursuit of happiness is a natural right.' It is undoubtedly a natural inclination; but can it be declared to be a right? That turns upon the way in which happiness is pursued. The assassin, in pursuit of his happiness, commits a murder. Has he a right to do so? If not, why declare that he has? How can such a declaration tend to render mankind more happy or more wise? Turgot was a great man, but he must have his golden thigh like Pythagoras,<sup>1</sup> or his dove like Mahomed. Without being conscious of it himself, inalienable and natural rights became with him a sort of dogma that ruled him with a tyrant's sway. If he considered a proposition to be palpably true, and saw no reason to doubt it, he referred it, without more ado, to natural law, natural justice. Thereafter he made use of it as an article of faith which he was no longer suffered to call in question.

The principle of Utility, having been often ill-applied or interpreted in a narrow sense, having, even, lent its name to crime, has appeared to be in conflict with eternal justice. It has thus become degraded and associated with vulgar greed, so that it needs some courage to restore it to a place of honour and sound logic on a sure basis.

I propose a treaty of peace with the partisans of natural rights. If 'Nature' really made such and such a law, those who lay it down with so much confidence, and have modestly undertaken to interpret it, must believe that 'Nature' had some reasons for making it. Would it not be safer, shorter, and more convincing, to give us those reasons at once, rather than to offer us the *ipse dixit* of this unknown legislator as being of itself sufficient authority?

<sup>1</sup> Cf. Smith's *Dictionary of Greek and Roman Biography* (edit. 1873), vol. iii., p. 616. (C. M. A.)

This would be the place to indicate the false tracks along which people are dragged in speech and argument, especially in deliberative assemblies—such as personalities, imputation of motive, prolixity, and ranting. But what has been said will suffice to show what does, or does not, conform with the principle of Utility.

These various false modes of argument may all be referred to one or other of the two false principles; and the making of this fundamental discrimination, while promoting brevity, will, also, be of great use in rendering clearer our ideas. To refer such and such arguments to one or other of the false principles is like binding so many tares in a bundle and throwing them into the fire.

I will close with a general observation. The language of error is at all times obscure and variable. A superfluity of words serves to cover a paucity and falsity of ideas; the oftener the phrases are altered, the easier it is to throw dust in the reader's eyes. The language of truth is simple and uniform: the same ideas, the same phrases. Everything is referred to pleasures or to pains. We avoid anything which might possibly conceal or intercept the oft-repeated maxim: 'From such and such an action results such and such an impression of pleasure or of pain.' Do not pin your faith on me, but on experience, and especially on your own. If you would know which of two contrary modes of acting should have the preference, calculate their effects in terms of good and evil, and adopt that which promises, on the whole, the greater sum of good.

# PRINCIPLES OF THE CIVIL CODE.

## DUMONT'S INTRODUCTION.

Civil Law  
rarely  
studied by  
laymen.

OF all branches of legislation, civil law is the one which presents fewest attractions for those who do not study the law as a profession. But this is hardly saying enough; it seems almost repellent to the lay mind. For a long time curiosity has engaged men in the consideration of political economy, penal law, and the principles of government. Famous works have made these studies fashionable; and, under penalty of confessing a humiliating inferiority, we must needs know something about them, or, at any rate, be prepared to express definite and assured opinions about them.

But the civil code has never yet emerged from the dusky purlieus of the Law; its commentators sleep amidst the dust of libraries, by the side of those with whom they lived in conflict. The public do not even know the names of the various sects into which the disputants were divided, but regard with silent respect countless folios and vast compilations, adorned with high-sounding titles, such as 'Body of Laws' and 'Universal Jurisprudence.' It must be allowed that the mode of treatment which the subject has received is largely responsible for its unpopularity. These heavy tomes occupy much the same place in the science of law as was occupied by the writings of the schoolmen in natural science, before the rise of experimental philosophy. To attribute their dryness and obscurity to the nature of the subject is treating them with far too much indulgence.

Correlation  
of Rights  
and Obligations.

Now, with what does this branch of the law deal? It deals with everything that is most interesting to mankind.

It treats of their security, their property, their transactions day by day, their domestic status in the relations of father, son, and spouse. Herein, too, we may discover the origin of 'rights,' with their corresponding 'obligations'; for all the objects of legal science may be reduced to these two terms, and, this done, there ceases to be any mystery about the matter.

Civil law is, in truth, only penal law under another aspect; and we cannot understand the one without understanding the other. Establishing 'rights' is the same thing as granting permissions and issuing prohibitions; it is, in effect, creating offences. Committing an offence is violating, on the one side, a right, and, on the other, an obligation: in case of a private offence, an obligation owing to a private individual, a right which he has over me; in case of a public offence, an obligation due to the public at large, a right which they have over me. Civil law is, therefore, only penal law regarded from another point of view. If I consider a law at the moment when it confers a right or imposes an obligation, I consider it from the civil point of view. If I consider the law in relation to its sanctions, the effects consequent upon the violation of a right or the breach of an obligation, I consider it from the penal point of view.

What, then, do we mean by 'Principles of Civil Law'? We mean the *motives* of laws—so that a knowledge of those principles is, really, a knowledge of the true *reasons* which should guide the legislator in prescribing the rights that he confers and the obligations that he imposes. But philosophy finds no place in the Law Libraries; we should search in vain for a single volume purporting to expound the reasons on which the civil code is based. The *Theory of Civil Law* by Linguet<sup>1</sup> is very far from redeeming the

Meaning of 'Principles.' The slight regard paid to them.

<sup>1</sup> Linguet (Simon-Nicolas-Henri) was born at Reims in 1736. His *Théorie des Lois Civiles* was published in 1767. In June, 1794, he was condemned to death, 'pour avoir encensé les despotes de Vienne et de Londres.' (C. M. A.)



promise of its title: it is the production of a disordered imagination, under the governance of a bad heart. His book would reduce all European governments to the model of an Oriental despotism, and so get rid of all notions of liberty and humanity, which seem, indeed, to disturb his mind like gloomy spectres.

The conflicting contentions of jurisprudents have produced, even in the law schools, groups of unbelievers who have doubted whether the science rests on any principles at all. According to these sceptics, law is purely arbitrary, and is good only because it is law—that is to say, because a legal decision, whatever it may be, has the great merit of inducing peace. In this view there lies a little truth, but a good deal more error. We shall see, in the following pages, that the principle of Utility extends to this branch of the law, as to all others; but that its application is difficult, and demands an intimate knowledge of human nature.

Bentham's  
method.

The first ray of light which broke in upon Bentham, in the course of his legal studies, was that the 'law of nature,' the 'original compact,' the 'moral sense,' the notion of 'right and wrong,' which were used to explain everything, are at bottom nothing more than the 'innate ideas' which Locke had already driven from the field. He saw that writers on these subjects were revolving in a vicious circle. Well acquainted with the method of Bacon and Newton, he determined to introduce it into matters of legislation; which, as I have already explained, he treated as an experimental science. He discarded all dogmatic words and rejected every term which does not express some sensation of pleasure or of pain. For example, he would not allow that the right of property is an 'inherent right' or a 'natural right,' inasmuch as those terms explain nothing and can prove nothing. The words 'justice' and 'injustice' were subject, in his view, to a like inconvenience, for they prejudge questions instead of throwing light upon

them. When he proposes to establish a law, he does not pretend to find one corresponding to it in the 'law of nature'; and then, as if by some vulgar piece of jugglery, to put forward as a thing already accomplished the very thing required to be done. When he explains 'obligations,' he does not involve himself in mysterious reasoning, nor does he admit any supposition whatsoever. He clearly shows that every obligation must either be founded on some service rendered beforehand to the person upon whom it is imposed, or rest on some superior need experienced by the person in whose favour it is imposed, or be based on some mutual agreement which derives the whole of its force from its utility. Thus, under the sole guidance of observation and experience, he considers only, so far as laws are concerned, the effects they produce on the faculties of man as a sensitive being; and he always assigns 'pains to be avoided' as the single argument of any real value.

The Civilians never cease reasoning upon fictions, and giving to these fictions the same effect as to realities; for example, they admit contracts which never existed, and quasi-contracts which never had even the appearance of existence. In certain cases they admit a 'civil death,' while in others they deny a 'natural death': such a dead man is not dead, such a living man is not alive; such an one who is absent must be considered as present, such an one who is present must be considered absent. A province is not where it is; a country does not belong to those who own it. Sometimes men are 'things,' and as such cannot possess rights; at other times 'things' are beings who possess rights and are bound by obligations. These same writers acknowledge imprescriptible rights which have always been prescribed against, and inalienable rights which have always been alienated; while that which 'is not' always stands out, in their eyes, more prominently than that which 'is.' Take away their fictions, or rather their falsehoods, and they know not where they are; for

Fictions  
of the  
Civilians.

they become so used to these crutches that they cannot stand without them. Bentham has rejected all these puerile arguments : he does not make use of any gratuitous supposition, any arbitrary definition, any reason which is not the expression of a fact, nor of any fact which does not represent some effect, either good or bad, of the law in question.

General  
applica-  
bility of  
Bentham's  
method.

It is by this method of always reasoning consistently with the principle of Utility that he has made of civil law a new science : nay, not only new, but even paradoxical to those reared in the teachings of the older schools, yet simple and natural enough to those who have not been led astray by false systems. Moreover, a translation of this book would have the same force and meaning in every tongue, because it appeals to the general experience of mankind : while technical reasons, based on abstract terms and arbitrary definitions, having only a local value and consisting merely of words, disappear altogether in any attempt to find synonyms for them in other languages. In much the same way, the nomad tribes of Africa, who use cowries for money, become aware of their poverty the moment they cross their own frontiers and tender their conventional wealth to strangers.

I ought to add that Bentham, in his manuscripts, makes many references to the laws of England, which I have not reproduced, as they seemed only of local interest. There are cases, however, in which his remarks would have lost their force if I had made no mention of the particular laws to which they were directed. In seeking, for the sake of clearness, to develop points which, in the original, were often mere allusions, I may have made some mistakes with which it would be unfair to saddle the author. These laws are generally so difficult to understand that it is dangerous even for an Englishman, who is not a lawyer, to hazard any opinion respecting them, and much more so, of course, for one who is not an Englishman.

# PRINCIPLES OF THE CIVIL CODE.

## PART I.

### OBJECTS OF CIVIL LAW.

#### CHAPTER I.

##### RIGHTS AND OBLIGATIONS.

OBJECTS which the legislator is called upon to distribute <sup>'Rights' and 'Obligations.'</sup> among the members of a community may all be reduced to two classes: (1) Rights; (2) Obligations. 'Rights' are, in themselves, advantages, benefits to the man who enjoys them. 'Obligations,' on the other hand, are duties, onerous burdens on him who has to fulfil them. Rights and obligations, although distinct and, indeed, opposite in character, nevertheless arise at the same moment, and throughout their common existence remain inseparable. In the nature of things, the law cannot confer a benefit upon anyone without at the same time imposing a burden upon someone else; or, in other words, it is not possible to create a right in favour of one person without imposing a corresponding obligation on another. How is a right of property in a piece of land conferred upon me? By imposing upon everybody else an obligation not to seize its produce. How is a right of command conferred upon me? By imposing upon a particular region or body of persons an obligation to obey me.

The legislator ought to confer rights with alacrity, because they are in themselves a benefit; he ought to impose obligations with reluctance, because they are in themselves an evil. The principle of Utility requires that



he should never impose a burden except for the purpose of conferring a benefit of greater value.

Curtail-  
ment of  
Liberty.

The law curtails liberty in the same measure as it creates obligations; it converts into offences acts which would, apart from its operation, be permissible and immune from punishment. The law creates an offence either by positive injunction or by negative prohibition. These encroachments on liberty cannot be avoided. It is impossible to create rights, impose obligations, or protect the person, life, reputation, property, means of livelihood, nay, even liberty itself, save at the expense of liberty.

Now, every curtailment of liberty is, in the nature of things, likely to be followed by a feeling of pain, more or less great; and this, quite independently of such suffering and inconvenience as may be occasioned by the form of restraint resorted to in the particular case. It follows, therefore, that no restriction ought to be imposed, no power conferred, no coercive law sanctioned, save on some specific and sufficient grounds. Against every coercive law there is always one reason—a reason which, if it stood alone, would always be sufficient in itself; it is, that such a law imports an attack upon liberty. Whosoever proposes coercion ought to be ready to prove, not only that a specific reason can be urged in favour of the proposal, but that such reason is more weighty than the general reason against all coercive legislation.

'Law' is  
opposed to  
'Liberty.'

The proposition that every law conflicts with liberty,<sup>1</sup> although almost self-evident, is not generally acknowledged. Indeed, enthusiasts for liberty, with more zeal than under-

<sup>1</sup> We must, of course, except those laws by which restrictive laws are repealed; laws which *permit* what other laws have forbidden (Dumont). It will be seen that Bentham *defines* liberty as including the power to inflict injuries on others, as, *e.g.*, 'liberty' to commit theft, etc. The curtailment of this 'liberty' by 'law' involves pain to the intending thief. This seems rather a question of terminology than one of substance. See chap. ii., *post*, p. 124, 'Liberty is a Branch of Security'; and see an interesting note on Austin's use of the terms 'Liberty' and 'Right' in Prof. Jethro Brown's *Austinian Theory of Law* at p. 180. (C. M. A.)

standing, have made it a point of conscience to challenge its truth. And how have they set about it? By perverting language, by declining to accept the ordinary meaning of the word 'liberty,' by speaking a tongue peculiar to themselves. According to their definition, 'Liberty consists in the power to do everything which does not hurt anybody else.' But is this the ordinary meaning of the word? Is not the liberty to do evil liberty? If not, what is it, and what word should we use in speaking of it? Do we not say that it is necessary to take away the liberty of rogues and madmen because they abuse it?

'Law' is  
opposed to  
'Liberty'  
—could.

If this definition were to obtain, I could never know whether I had the 'liberty' to do a particular action, unless and until I had examined all its possible consequences. If such action seemed to me calculated to hurt even a single individual, I should not be 'at liberty' to do it, and this although the law permitted, or, it may be, commanded, it. A judicial officer would not be 'at liberty' to punish a thief, unless, indeed, he were sure that the punishment could not hurt the thief! Such are the absurdities implied in this definition.

What does pure reason say? Let us begin at the beginning, and try to set down a few fundamental propositions.

The sole object of government should be the greatest possible happiness of the community.<sup>1</sup> The happiness of an individual is greater, in proportion as his sufferings are less poignant and fewer in number, and as his enjoyments are more intense and greater in number.

The care of providing enjoyments should be left almost entirely to the individual himself, the principal function of government being to protect him from suffering.

<sup>1</sup> In the later years of his life Bentham came to the conclusion that the phrase 'The greatest happiness of the greatest number' was wanting in clearness and precision. He accordingly substituted for this phrase the simpler expression 'The greatest happiness,' as representing the true object of morals and politics. The 'greatest number' he dismissed as superfluous. (C. M. A.)

Now, government discharges this office by creating rights, which it confers upon individuals : rights of security for the person, rights of protection for honour, rights of property, rights of relief in case of need. To these rights correspond all classes of offences. The law cannot create rights without creating corresponding obligations : it cannot create rights and obligations without creating offences :<sup>1</sup> it can neither enjoin nor forbid without restraining the liberty of individuals.<sup>2</sup>

The citizen, then, cannot acquire any rights except by sacrificing part of his liberty. Governments approach towards perfection in proportion as the acquisition is greater and the sacrifice less ; but, even under a bad government, there is no sort of proportion between the acquisition and the sacrifice.

<sup>1</sup> To create an offence is to convert an act into an offence: to give to an act the quality of an offence by means of prohibition (Dumont).

<sup>2</sup> When the law confers a right, the restraint arises by giving the quality of offences to the various actions by which the enjoyment of the right may be interrupted, or with which it may be in conflict (Dumont).

## CHAPTER II.

### OBJECTS OF THE CIVIL LAW DISTINGUISHED.<sup>1</sup>

IN prescribing and distributing rights and obligations, the legislator should, as we have pointed out, seek as his end and aim the happiness of the body politic. Inquiring more particularly wherein this happiness consists, we find four subordinate objects: 'Subsistence,' 'Abundance,' 'Equality,' 'Security.' The more perfect the enjoyment in all these respects, the greater the sum of social happiness, and especially of that happiness which is dependent upon the laws. Hence we conclude that all the functions of law may be referred to one or other of these four heads: to provide subsistence, to aim at abundance, to encourage equality, and to maintain security. This division does not possess all the clearness and precision one could wish: the bounds of these objects are not always easy to determine, for they approach each other at various points, and become, more or less, confused. But the classification is justified by its completeness, and by the fact that we are often called upon to consider each of the objects comprised in it separately, and as distinct from the others. 'Subsistence,' for example, is included in 'abundance': and yet it is very necessary to consider it separately; inasmuch as the law ought to approve many things with a view of providing subsistence, which it should by no means suffer for the mere purpose of promoting abundance.

Factors of  
Happiness.  
'Subsist-  
ence,'  
'Abun-  
dance,'  
'Equal-  
ity,' 'Secu-  
rity.'

<sup>1</sup> Cf. 'Constitutional Code,' Introduction, chap. iii. (Bowring, vol. ix. p. 11). (C. M. A.)



'Security'  
should be  
the para-  
mount  
object.

'Security' admits of as many distinctions as there are kinds of action which may come in conflict with it. It has relation to a man's person, his honour, his property, and his status. Acts injurious to security, when expressly prohibited by law, assume the character of crimes.

Of these objects of the law, 'security' is the only one which, of necessity, comprehends the future. We may have to consider 'subsistence,' 'abundance,' or 'equality,' in regard to a mere moment of time; while 'security' implies extension, in point of time, to all the benefits which it embraces. 'Security' is, then, the principal, indeed the paramount, object.<sup>1</sup>

'Equality.' I have ranked 'equality' among the objects of the law. In any arrangement contrived to give to all men the greatest possible sum of happiness, there is no reason why the law should cast about to give more to one man than to another. On the contrary, there are excellent reasons why it should not do so. The advantage which would accrue on one side would never balance the disadvantage experienced on the other; for the pleasure will extend only to the person favoured, while the pain will extend to every one of those who do not share the favour. Equality may be encouraged both by safeguarding it where it exists already, and by seeking to promote it where it is not yet to be found. But herein lies the peril: a single mistake may overthrow social order and dissolve the bonds of society.<sup>2</sup>

'Liberty'  
is a branch  
of 'Secu-  
rity.'

Some persons may be surprised to find that 'Liberty' is not ranked among the principal objects of the law. But,

<sup>1</sup> Cf. Halévy, vol. i., p. 76: '*Dans la philosophie benthamique du droit civil, les deux tendances, conservatrice et révolutionnaire, se manifestent, tour à tour, quoique la première l'emporte constamment en importance sur la seconde, et de beaucoup.*' (C. M. A.)

<sup>2</sup> Equality may be considered in relation to all the advantages derived from the laws: Political Equality, or Equality in point of Political Rights—Civil Equality, or Equality in point of Civil Rights. When used alone, the word is commonly understood as referring to the distribution of property (Dumont).

if we would avoid confusion, we must regard it as a branch of 'Security.' 'Personal liberty' is security against a certain class of wrongs which affect the person; while what is called 'political liberty' is also a branch of security—security against injustice at the hands of the persons entrusted with government.<sup>1</sup> Matters relating to this object appertain rather to the constitutional than to the civil code.

<sup>1</sup> Cf. 'Liberty is neither more nor less than the absence of coercion. This is the genuine, original, and proper sense of the word Liberty. The idea of it is an idea purely negative. It is not anything that is produced by positive Law. It exists without Law, and not by means of Law. . . . That which under the name of Liberty is so much magnified as the invaluable work of Law, is not *Liberty*, but *Security*' (MSS. University College, No. 69; cited Halévy, i. 360). The various dicta of Austin on the use of the terms 'Liberty' and 'Right,' says Professor Jethro Brown, seem to indicate a lack of clearness and precision not usual with him. His general position, however, appears to be substantially accurate: 'In Liberty the prominent or leading idea is the absence of restraint; whilst the security for the enjoyment of that Liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of restraint' (*Austinian Theory of Law*, at p. 180). (C. M. A.)

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## CHAPTER III.

### RELATIONS BETWEEN THE OBJECTS OF THE CIVIL LAW.

Relative  
position of  
the four  
objects.

IN the mind's eye these four objects of the law seem quite distinct, but in practice they are found to be much less so. Thus, the same law may subserve more than one of them, inasmuch as they are often blended together. For example, what is done in the interests of 'security' may, at the same time, promote 'subsistence' and 'abundance.' But, on the other hand, circumstances occur in which it is not possible to reconcile these objects, and a measure suggested by one principle will be condemned by another. For example, 'equality' might require such a distribution of property as would be incompatible with 'security.' When, between two of these ends, conflict, in fact, occurs, we must needs determine which is to prevail; otherwise the principles, instead of guiding us in our researches, will serve only to make our confusion worse confounded.

Now, at the first glance, it is plain that 'subsistence' and 'security' rise together to the same height; while 'abundance' and 'equality' manifestly stand at a lower level. Indeed, without security, equality could not endure for a day; and without subsistence, abundance would obviously be an impossibility. The first two objects are life itself; the last two serve, so to speak, as the embellishment of life.

Security.'

In legislation, the most important object is security. Even if there were no explicit laws bearing on subsistence, we may well suppose that it would not be neglected by anybody; but if we had no explicit laws bearing on security,

it would be quite useless to make any as to subsistence. Enjoin men, if you will, to encourage production, to cultivate the soil: so far you will have done little or nothing. But assure to the cultivator the fruits of his industry, and perchance you will have done enough.

Security, as we have already remarked, has several branches, and some of them must be made to yield to others. For example, liberty, which is a branch of security, must yield to considerations of general security, since laws cannot be made at all save at the expense of liberty. We cannot, then, obtain the greatest good without the sacrifice of some subordinate good. The whole difficulty of the legislative art consists in distinguishing, on each occasion, the particular object which is to be treated as of paramount importance. Each one, in turn, demands pre-eminence; and at times a very complex calculation becomes necessary if we would be sure of awarding the preference to the rightful claimant.

Equality ought not to be favoured, except when it does 'Equality,' not injuriously affect security, nor disappoint expectations aroused by the law itself, nor disturb a distribution already actually settled and determined.<sup>1</sup>

If, at stated periods, all property were equally divided, the certain consequence would be that very soon there would be nothing to divide. It would not be long before everything came to an end. Those whom the division was intended to favour would suffer not less than those at whose expense it was to be made. For if the share of the worker were no larger than the share of the idler, there would no longer be any incentive to industry.

If we were to lay down as a principle that all men ought to enjoy 'equal rights,' we should thereby and of necessity render legislation impossible: for the law is ever establishing inequalities, as it cannot bestow rights upon

<sup>1</sup> As to the 'Reconciliation of Equality and Security,' see 'Civil Code,' Part I., chap. xii., *post*, p. 161. (C. M. A.)



'Equal  
rights'—  
*contd.*

some without, at the same time, imposing obligations upon others.

To say that all men—that is, all human beings—have equal rights is to say that there is no such thing as subordination. The son has equal rights with the father; he has the same right to govern and chastise his father that his father has to govern and chastise him. He has as much right in his father's house as the father himself. The maniac has the same right to shut up others as they have to shut up him. The idiot has the same right to control his family that the family have to control him. All this is fully implied in 'equality of rights': it means either this or nothing at all. I am, of course, aware that those who maintain the doctrine, not being themselves either madmen or idiots, have no intention of establishing this absolute equality: they have in their minds various restrictions, modifications, and explanations. But, if they do not know how to express themselves sensibly and intelligibly, will the blind and ignorant multitude be likely to understand them better than they seem to understand themselves? If they are thought to proclaim licence and freedom from all control, it is but too sure that they will get a hearing.

## CHAPTER IV.

### OF LAWS RELATIVE TO SUBSISTENCE.

WHAT can the law do relative to subsistence? Nothing directly. All it can do is to create 'motives'; that is to say, to create rewards and penalties by dint of which men would be led to provide a livelihood for themselves. But Nature has herself created such motives, and endowed them with the needful intensity. Long before there was any conception of law in the abstract, want and enjoyment had, in this respect, done all that could have been done by laws, however well concerted. Want, armed with pains of all kinds, even death itself, had exacted labour, spurred the spirit of bravery, inspired foresight, and developed every faculty bestowed on mankind. Enjoyment, the inseparable companion of each satisfied want, had furnished an inexhaustible store of rewards for those who overcame the obstacles and fulfilled the designs of nature.

Laws as to  
'Subsist-  
ence' gen-  
erally un-  
necessary.

The force of the physical sanction being sufficient, the employment of the political sanction would be superfluous.

Moreover, such motives as depend on law are always more or less uncertain in their operation: at times this is a consequence of the imperfection of the laws themselves; at others, it arises from a difficulty in proving such facts as are necessary to justify the application of punishment or the conferment of reward. Throughout the processes that intervene before reaching the complete enforcement of any law, there always lurks at the bottom of the human heart some hope of escaping with impunity, however faint that hope may be; but natural effects, which we may

regard as the rewards and punishments of nature, scarce admit of any uncertainty. In the course of nature there can be no evasion, no delay, nor is any favour shown: the lessons of experience foreshadow the coming event, and experience itself lends confirmation, for to-day gives tangible form to the lesson of yesterday. The uniformity of this process leaves no room for doubt: what, then, could be added, by dint of express laws, to the constant and irresistible force of these natural motives ?

Indirect  
action of  
'Security.'

The law, however, does provide for subsistence indirectly, in that it protects men while they labour, and secures to them the fruits of their industry when the task is done 'Security' for the worker; 'security' for the fruits of his toil. Such is the benefit derived from law, and it is a boon beyond all price.

## CHAPTER V.

### OF LAWS RELATIVE TO ABUNDANCE.

COULD we to make laws requiring men not to rest content with a mere livelihood, but to seek abounding wealth? No! That would be a wholly superfluous employment of artificial means where natural means suffice. The attractions of pleasure, want succeeding want like the links in an endless chain, the ever-active desire to enhance our own well-being, all these, with the safeguard of 'security,' will lead to fresh and ceaseless efforts towards further acquisition. Wants and enjoyments, those never-failing spurs of society, begin by raising a few blades of corn; and then, by slow degrees, raise vast granaries, built of ever-increasing size and never full. Desires grow with the means for their gratification: the horizon expands as we move towards it, and every fresh want, with its associated pain and pleasure, becomes a new principle of action. Opulence, which, after all, is only a comparative term, does not arrest this movement when once it has begun: on the contrary, the greater a man's means the greater his sphere of operations, so that his reward is also greater, and, as a consequence, the strength of the motive which impels him to labour. Now, what is the wealth of a community if not the aggregate wealth of its members? And what more is needed than the impulsive force of these natural motives to secure the maximum of wealth?

We have thus seen that abundance is created gradually, and by the continued operation of the very causes which produce subsistence. These two ends are not in conflict;

Natural motives sufficient for 'Abundance.'

'Abundance' is to be encouraged.



Abundance  
--contd.

on the contrary, the greater the abundance the more secure is subsistence. Those who condemn abundance, under the name of luxury, have never really grasped this point of view.

Bad seasons, wars, and accidents of every kind, so often assail the stores necessary for subsistence, that a community which had no superfluous stock, or, even, had not a considerable superfluous stock, would always be liable to feel the want of necessities. We see this among savage tribes; and, indeed, it was to be seen among all nations in the olden time, before wealth accumulated. It is what happens in our own day in countries little favoured by nature, such as Sweden; and in those where government trammels the operations of commerce instead of affording them scope and protection. But countries in which luxury abounds, if under enlightened rule, are not exposed to the risk of famine. Such is the happy situation of England. Where commerce is free, a gewgaw, even though useless in itself, may have its utility if employed as a pledge deposited to obtain some article of necessity. Factories where luxuries are produced may become, as it were, offices for insurance against famine: buildings used for making beer or starch may, at a pinch, supply stores for subsistence.

How often have we heard people declaim against dogs and horses for devouring the food of man! Such profound politicians are but one degree above those apostles of disinterestedness who set the granaries afire to bring about an abundance of corn.

## CHAPTER VI.

### PATHOLOGICAL PROPOSITIONS UPON WHICH THE ADVANTAGE OF EQUALITY IS FOUNDED.

PATHOLOGY is a term used in medicine; but it has not so far been employed in Morals, where, however, it is equally needed. I define pathology as the study and science of sensations, affections, and passions, and of their effects upon human happiness.

Application  
of 'Path-  
ology' to  
Morals.

Legislation, which has hitherto been founded in great measure upon the quicksands of instinct and prejudice, ought at length to be reared on the impregnable rock of sensation and experience.

We ought to have a sort of moral thermometer which would mark every degree of happiness and suffering; and, though that is a pitch of perfection to which we cannot hope to attain, it is well to keep it ever before our eyes. I know that a minute examination of 'more or less,' on points of pain and pleasure, will appear, at the first blush, to be a useless study of insignificant detail; it will be said that, in human affairs, we can only deal with generalities, and must rest content with loose approximation. But this is the language of one who lacks either interest in the subject, or the capacity to understand it. The feelings of men vary with sufficient regularity to become the object to a science, or, shall we say, an art; and, until this is established, we shall find people simply groping their way in tentative fashion, and making efforts as ill-directed as they are half-hearted. The science of medicine is founded on the axioms of physical pathology. Morals may be deemed

the medicine of the soul, and legislation, which is the practical branch of the science of Morals, ought to have for its foundation the axioms of mental pathology.

Effect of a portion of wealth on happiness. Three cases to be considered.

In order to judge of its effect upon happiness, a portion of wealth must be considered in three different states: (1) When it has always been in the hands of the party interested; (2) when it is just about to come into the hands of a new possessor; and (3) when it is just about to be taken from the hands of the present possessor.

NOTA BENE.—When we speak of the effect of a portion of wealth upon happiness, it is always without reference to the sensibility of the particular individual, or to the circumstances of environment in which he may happen to be placed. Difference of character is inscrutable; while the diversity of circumstances is such that they are never the same for two individuals. Unless, therefore, we begin by eliminating these two considerations, it will be impossible to arrive at any general conclusions. But, although any one of our propositions may be found false or inexact when applied in a given case, this should not lead us to doubt their theoretical accuracy or their practical utility. It is sufficient to justify our propositions if ( $\alpha$ ) they approach more nearly to the truth than any others that can be substituted for them, and ( $\beta$ ) they can be employed more conveniently than any others as the basis of legislation.

Consideration of the first case. Wealth in possession.

I. Let us now proceed to the first case: an examination of the effect of a portion of wealth which has always been in the hands of its present possessor.<sup>1</sup>

( $\alpha$ ) *To each portion of wealth there corresponds a portion of happiness.* ( $\beta$ ) *Of two individuals with unequal fortunes, he who has the greater wealth will also enjoy the greater happiness.* ( $\gamma$ ) *The excess of happiness on the part of the more wealthy will not be, in proportion, so great as his excess of wealth.* For the same reasons, ( $\delta$ ) *the greater the disproportion between the two masses composing a given aggregate of wealth,*

<sup>1</sup> Cf. *Pannomial Fragments* (Bowring, vol. iii., pp. 228, 229). (C. M. A.)

the less the probability that there exists a disproportion equally great between the masses of happiness. ( $\epsilon$ ) The more nearly the actual proportion approaches to equality,<sup>1</sup> the greater will be the aggregate mass of happiness.

We need not limit what is here said of wealth to the condition of those who are called 'wealthy.' The term 'wealth' has a wider signification, and embraces everything which may be included either in subsistence or in abundance. It is for brevity's sake that we speak of 'a portion of wealth' instead of 'a portion of the matter of wealth.'

I have said (proposition  $\alpha$ ) that to each portion or particle of wealth there corresponds a portion or particle of the matter of happiness: to speak with precision, I should have said there is a certain *chance* of such correspondence. The efficacy of any cause of happiness must always be uncertain; or, in other words, a cause of happiness may not produce its ordinary effect, or the same effect, upon all persons. And this is, of course, the point at which we must apply what has been said as to the character and sensibility of different individuals, and as to the variety of circumstances which will be found to exist.

The second proposition ( $\beta$ ) is derived, as a direct consequence, from the first. Of two individuals, the one who has the greater wealth will also enjoy the greater happiness, or, at any rate, will have the greater chance of doing so: the proof of this fact rests on the experience of the whole world. The first man who ventures to doubt it I will call as a witness to establish its truth: let him give any superfluous wealth he possesses to the first comer who asks him

<sup>1</sup> Cf. Hume, *An Inquiry concerning the Principles of Morals*, sect. iii., part ii. (*Essays*, edit. of 1793, vol. ii., p. 248): 'It must be confessed that, wherever we depart from this equality, we rob the poor of more satisfaction than we add to the rich; and that the slight gratification of a frivolous vanity in one individual frequently costs more than bread to many families, and even provinces' (cited Halévy, i. 309). A chief part of the baseness of the rich man, who seized the ewe lamb of his poor neighbour, consisted in doing that which caused so much greater pain to the sufferer than happiness to the receiver (cf. Colonel Perronet Thompson's *Works*, i. 136). (C. M. A.)



Wealth in  
possession  
—*contd.*

for it—according to his theory, such superfluity is but a handful of sand, a burden and nothing more. The manna of the desert putrefied when the people had gathered more than they could consume. If, in the same way, wealth, after reaching a certain point, no longer increased a man's chance of happiness, no one would wish to go beyond that point, and the desire of accumulation would be confined within meted bounds.

The third proposition ( $\gamma$ ) is even less open to dispute. On one side place a thousand peasants, having enough to live upon and a trifle to spare: place on the other side a king, or, to avoid having to make allowance for the cares of sovereignty, say a prince with great possessions, who is himself as rich as all the peasants taken together. I say that the chances are the happiness of the prince will be greater than the average happiness of the peasants, but not so great as the aggregate of all their thousand portions of happiness; or, what comes to the same thing, the chances are that his happiness will not be a thousand times greater than the average happiness of the peasants. It would, indeed, be going very far to say that his happiness would be found to be ten times, or even five times, greater. A man born in the lap of wealth is not so sensible of its value as he who has been the architect of his own fortune. It is the pleasure of acquiring, not the satisfaction of possessing, that imparts the most exquisite enjoyment. The one is an active passion, whetted by desire and past privation, which spurs a man towards unknown delights; the other is a languid sentiment, grown stale from habit and never enlivened by contrast, and one to which no charm is lent by the play of imagination.

Considera-  
tion of the  
second case.  
Portion of  
wealth  
added.

II. Passing on to the second case, let us examine the state of things when a portion or particle of wealth is about to come into the hands of a new possessor. We will put aside any question of expectation, and suppose that the increase of wealth comes unexpectedly, as a godsend.

1. *A portion of wealth may, by subdivision, be so far divided as not to produce any happiness at all for any one of the partakers.* This would, strictly speaking, happen when the share of each was less than the value of the smallest current coin; but it is not necessary to go to that extreme in order that the proposition may be true.

2. *Where the participants are already of equal fortunes, the more perfectly this equality is preserved, the greater will be the total mass of happiness in the event of a distribution of additional wealth.*

3. *Where the participants are of unequal fortunes, the more the distribution of any given amount of additional wealth tends to bring about a condition of equality, the greater will be the total mass of happiness.*

III. Passing on to the third case, we must consider the state of things when a portion or particle of wealth is about to go out of the hands of its former possessor. We will again put aside any question of anticipation, and suppose that the loss is quite unforeseen; as, indeed, a loss generally is, since men naturally expect to keep what they possess. And this expectation is in accord with the ordinary course of events; for, taking men as a whole, they not only keep the wealth they have amassed, but add to it still further. As a proof, contrast the original poverty of a community with its resources at any given period.

Consideration of the third case. Portion of wealth taken away.

1. *The loss of a given portion of wealth will produce a loss of happiness to an individual, more or less great, according to the ratio between the part he loses and the part he retains.*

Take away from a man the fourth part of his fortune, and you take away the fourth part of his happiness, and so on. But there are cases in which this ratio does not obtain.<sup>1</sup>

<sup>1</sup> It is to this head that the evil of heavy gambling must be referred. Though the chances in point of money may be equal, the chances in the point of happiness are always unfavourable. I am worth £1,000. The stake is £500. If I lose, my fortune is diminished one half; if I gain, it is only increased by one third of the whole. Suppose the stake to be £1,000. If I gain, my happiness is not doubled with my fortune: if I lose, my happiness is destroyed—I am reduced to poverty (Dumont).

Suppose, for example, that, in taking three-fourths of my fortune, you encroach upon the part necessary for the supply of my physical wants, while in taking only one-half you leave that part untouched, the loss of happiness in the first case will not be simply fifty per cent. more than in the second case, but may be twice as much, or ten times as much:—one does not know where to stop.

2. (Assuming the first proposition.) *Fortunes being equal and the aggregate amount to be subtracted being given, the greater the number of persons among whom the loss is shared, the less will be the subtraction from the aggregate of happiness.*

3. *After reaching a certain point, further subdivision renders the several shares impalpable, and the loss occasioned to the aggregate of happiness amounts to nothing.*

4. *When fortunes are unequal, the loss of happiness produced by a given loss of wealth will become less in proportion as the distribution of the loss tends towards the bringing about of an exact equality of fortunes.*

We here neglect all inconveniences attached to, or arising from, any violation of 'security.'

Application  
of these  
principles  
to the  
distribu-  
tion of  
losses.  
Policies of  
Insurance.

Governments, profiting by the advance of knowledge, have in many matters favoured the principles of equality in connection with the distribution of losses. For example, they have thrown the protecting ægis of the law over policies of assurance, those very useful contracts whereby individuals club together in advance so that they may be in a position to face all possible losses. The principle of assurance, founded on an estimate of probabilities, is nothing more than the art of distributing losses among a number of adventurers sufficiently great to make the loss, in the case of a particular adventurer, very light, or, perhaps, almost negligible.

Indemnifi-  
cation for  
losses oc-  
casioned by  
war, crim-  
inal acts,  
etc.

The same motive has influenced princes when, at the expense of the State, they have indemnified subjects who have suffered from public calamities or the devastations of war. Nothing could have displayed greater wisdom or



intelligence than the administration of Frederic the Great in this regard; and this is one of the most excellent points of view from which to study the rules for the government of communities.

Some attempts have been made to indemnify individuals for losses caused by the crimes of malefactors; but instances of laws directed to this end are still very rare. It is, however, an object which deserves the attention of legislators, since by this means the mischief of offences against property may be enormously reduced.<sup>1</sup> But such a scheme would have to be devised and adjusted with great care, or it would lead to harmful consequences. We must never foster indolence and rashness, which, if secure of indemnification, would assuredly neglect precautions against crime. The utility of the remedy would depend, therefore, on its form and mode of administration. But it would be nothing less than culpable indifference to neglect so salutary a measure altogether, merely to escape the trouble of eliminating inconveniences.

The principles we have enunciated will serve equally well to regulate the distribution of a loss among several persons charged with a common responsibility. If their respective contributions are in proportion to their respective fortunes, their relative condition will be the same as before; but if it be desired to seize this occasion to bring about an *even nearer* approach to *equality*, we must needs adopt a different ratio. To make a uniform levy, without any regard to respective differences of fortune would be a third plan; but it would conform neither with equality nor security.

Graduated  
distribution  
of burdens.

To put the matter in a clearer light, I will present a compound case in which we have to decide between two individuals, one of whom seeks a profit at the expense of

Comparison  
of a gain  
with a loss  
of equal  
amount.

<sup>1</sup> Cf., e.g., the Riot (Damages) Act, 1886 (49 and 50 Viet., c. 38), whereby compensation may be awarded out of the police rate in respect of losses occasioned by persons riotously and tumultuously assembled together. (C. M. A.)



Gain *versus*  
Loss.

the other. The question is, of course, to determine the effect of a portion of wealth which, in order to pass into the hands of one individual in the shape of gain, must come out of the hands of another in the shape of loss.

I. *Among competitors of equal fortunes, if what is to be gained by one is to be lost by the other, the arrangement which would be productive of the greatest sum of happiness will be that which favours the one from whom the profit is claimed, to the exclusion of the claimant.*

For (α), as any sum awarded would bear a greater ratio to the reduced fortune than the same sum to the increased fortune, the diminution of happiness in the case of the one would be greater than the augmentation of happiness in the case of the other; in a word, 'equality' would be violated by an arrangement which involved such a transfer. [See the note upon gaming, *ante*, p. 137. The case is exactly the same.]

(β) If any transfer were directed, the loser would experience a pain of disappointment; if no order were made, the claimant would be simply in the condition of not having gained. The negative evil of not acquiring is not equal to the positive evil of losing; otherwise, every man experiencing the evil with regard to everything which he does not obtain, the causes of suffering would be infinite, and men, presumably, infinitely miserable.

(γ) Mankind in general appear to be more sensible to chagrin than to pleasure, when under the influence of causes of like magnitude. Indeed, this disposition extends so far that a loss which diminishes a man's fortune by one-fourth would probably take from him more happiness than he would derive from a gain by which his fortune was doubled.<sup>1</sup>

<sup>1</sup> It does not follow that the sum of evil is greater than the sum of good. Not only is evil more rare, but it is accidental: it does not flow, like good, from constant and necessary causes. Moreover, up to a certain point, it is in our power to drive away evil and attract good. There is, too, in mankind a feeling of confidence in happiness which prevails over the fear of its loss, as is evidenced by the success of lotteries (Dumont).

2. *Where the fortunes are unequal, if the loser be the poorer, this inequality will enhance the evil of the loss.*

3. *Where the fortunes are unequal, if the loser be the richer, the evil caused by the attack on security will be in part compensated by the portion of good arising from the progress made towards equality.*

By the aid of these maxims, which have, up to a certain point, the character and certainty of mathematical propositions, it will ultimately be possible to produce definite and lasting rules as to indemnities and satisfaction. Legislators have often shown a disposition to give heed to the counsels of equality, under the name of 'equity,' to which greater latitude is conceded than to that of 'justice.' But this conception of equity, ill-defined and ill-developed, has seemed rather a matter of instinct than of calculation. It is only by orderly procedure and much patience that a mass of loose and confused sentiments can be reduced to rigorous propositions.

## CHAPTER VII.

### OF SECURITY.

WE have now reached the main object of law—the cultivation of ‘security.’

Meaning of  
‘Security.’

This inestimable boon, the distinctive mark of civilization, is entirely the creature of law. Without law there is no security, and therefore no abundance, not even a certainty of subsistence; and, in such a state of things, the only equality which could obtain would be equality of poverty.

Condition  
of savage  
races.

To form a just conception of this beneficent creature of the law, we need only consider the condition of savage races. Ceaseless is the war they wage against famine; and yet on occasion it wipes out whole tribes in the course of a few days. The struggle for subsistence drives them into cruel warfare; and, after the manner of wild beasts, men hunt their fellows that they may batten on their flesh. The horror of a fate so dreadful subdues all the softer sentiments of the heart; and pity unites with insensibility in putting to death old men no longer fitted for the chase.

Condition  
during  
periods  
of war.

Let us consider, too, what occurs during those terrible periods when civilized societies revert wellnigh to the savage state; that is to say, in time of war, when the laws which make for security are, to a great extent, in abeyance. At such a time, every moment breeds fresh calamity; at every fresh step taken, in response to every new movement, the existing stores of wealth, the provision made for abundance and subsistence, grow smaller by degrees, and in the end disappear altogether. Palace and cottage are pillaged alike: and, but too often, the passion, or even the caprice,

of a moment will consign to destruction the tardy product of a century of toil.

Law alone has succeeded in doing that which all the natural sentiments, with united effort, could never have accomplished.<sup>1</sup> Law alone has been able to create a possession so firm and durable as to be worthy of the name 'property.' It is law alone that could have made men provident—accustomed them to bend under the yoke of forethought, at first hard to be borne, but afterwards light and pleasant. It alone succeeds in urging men to labours, which, though designed to yield them fruit hereafter, are of no present advantage. Economy has as many enemies as there are spendthrifts; as there are idlers, who would enjoy without being at the pains to produce. Toil is irksome to idleness; it is too slow for impatience. Cunning and dishonesty secretly conspire to appropriate its fruits; while insult and effrontery think to ravish them by open force. So that security is surrounded by snares on every side: ever threatened, never at peace, it seems always on the brink of tottering to its fall. The legislator requires never-failing vigilance, and sustained forces in constant play, to defend it against the crowd of adversaries that spring up in every direction.

Operation  
of Law.

Law does not say to a man: 'Work, and I will reward you.' It says rather: 'Work, and, by staying the hand that would tear them from you, I will assure to you enjoyment of the fruits of your toil—the natural and sufficient reward which, without my aid, you could not retain.' While Industry creates, it is Law that preserves; while at the outset we owe everything to labour, yet ever afterwards we are indebted to law alone.

In order to form a clear conception of the extent to which we ought to carry this principle of security, we must remember that the sufferings and enjoyments of man are not, like those of the brute creation, confined to sensations

'Security'  
must pro-  
vide for  
the future.

<sup>1</sup> Cf. 'Principles of Legislation,' chap. xiii. (10); *ante*, p. 107. (C. M. A.)



relating only to the particular moment under consideration.

Man is susceptible of pleasure or pain by anticipation; so that it is not sufficient to secure him from present loss. We must, so far as possible, guarantee him against damage to his possessions in the future. We must extend our conception of security so as to embrace the whole vista that his imagination is capable of filling.

'Expectation' and  
'Disappointment.'

This disposition to look ahead, which has so marked an influence on the lot of mankind, may be called 'expectation'—expectation of the future. 'Tis by its operation that we are enabled to form a general plan of conduct; that the successive moments which compose the duration of life are not, so to speak, isolated and independent points, but become parts of a continuous whole. 'Expectation' is a chain which unites our present being to our future existence, passing beyond ourselves to the generations that are to come; and the sensibility of a man extends through every link in the chain of his expectations.

The principle of security comprehends the maintenance of all these our expectations; it demands that events, so far as they can be made dependent upon laws, shall conform with the expectations to which the laws have given birth.

Every blow struck against this sentiment of expectation carries with it a distinct and peculiar evil consequence which we may call the 'pain of disappointment.'

'Disappointment-preventing Principle.'

It is a proof of singular confusion in the minds of jurists that they have never paid any special attention to a sentiment which exerts so powerful an influence in human affairs. The word 'expectation' is hardly to be found in their vocabulary; and scarce an argument based on this principle occurs in any of their writings. They have, without doubt, followed the principle in many instances; but it has been by instinct rather than from reason. If they had recognized its vital importance, they would not have failed to give it a name—to give some clear indication of its presence instead of suffering it to be lost in the crowd.

## CHAPTER VIII.

### OF PROPERTY.

THAT we may more fully appreciate the advantages of law, let us endeavour to form a clear conception of 'property.' We shall find that there is no such thing as natural property: it is entirely the creature of law.<sup>1</sup>

'Property' is the creature of Law.

Property is nothing more than the basis of a certain expectation; namely, the expectation of deriving hereafter certain advantages from a thing (which we are already said to possess) by reason of the relation in which we stand towards it.

There is no image, no picture, no visible lineament, which can portray the relation that constitutes 'property.' It belongs not to physics, but to metaphysics; it is altogether a conception of the mind.

To hold the object in one's hand—to keep it, to manufacture it, to work it up into something else, to make use of it—all or any of these physical circumstances fail to assist in conveying the idea of property. A piece of cloth actually in the Indies may belong to me, while the coat which I have on may not be mine. The very food which has mingled with my body may be the property of another to whom I must account for the price.

The conception of property consists in a fixed and settled expectation; in the persuasion of my capacity to derive from the object, hereafter, certain advantages, of a character dependent upon the nature of the case. Now, this

<sup>1</sup> Cf. Hume's *Philosophical Works* edition of 1826], vol. ii., pp. 274 *et seq.*; and see p. 305. (C. M. A.)

expectation, this persuasion, can only result as the work of law; for I cannot reckon on the enjoyment of that which I regard as my own, save through the promise of the law which guarantees it to me. It is the law alone which makes it possible for me to forget the insecurity of my natural condition, and emboldens me, with reasonable hope of a harvest as yet far distant, to enclose a plot of land and give myself up to the toil of cultivation.

Origin of  
rights of  
property.

But it may be asked, What was the origin of this doctrine of property? When the law adopted the objects which, under the name of property, it promised to protect, what was the principle that prompted its action? We may, perhaps, answer this question by propounding another. Had not man in his primitive state a *natural* expectation of enjoying certain things—an expectation drawn from sources prior to the law and independent of it? Yes: there have been from the beginning, and there always will be, circumstances in which a man may secure himself in the enjoyment of certain things by his own unaided efforts. But the catalogue of such cases is very restricted. The savage who has hidden his prey may hope to keep it for himself so long as his cave remains undiscovered; so long as he is on the watch to defend it, and proves stronger than his foes. But that is all. How wretched and precarious is possession of such a type as this!

If we now go on to suppose the baldest form of mutual agreement among the savages to respect each other's booty, we have at once the introduction of a principle to which you can give no other name than 'law.' A feeble and transitory kind of expectation may, from time to time, arise from circumstances purely physical; but a firm and abiding expectation can result from law alone. That which, in a state of nature, is, so to speak, no more than a thread, becomes, when society is constituted, a veritable cable.

Property and law were born together, and would die

together. Before the laws property did not exist; take away the laws, and property will be no more.

As regards property, 'security' consists in there being no shock or disturbance occasioned to the expectation, founded on the laws, of enjoying such and such a portion of wealth. The legislator owes the greatest respect to such expectations, for they are expectations which he himself has brought into being: it is essential to the happiness of society that he should not defeat them; and, whenever his edicts clash with them in any degree, those edicts give rise to a proportionate measure of positive evil.

Meaning of  
'security'  
in relation  
to 'prop-  
erty.'



## CHAPTER IX.

### ANSWER TO AN OBJECTION.

Error to  
suppose  
that laws of  
property  
are oppres-  
sive to the  
poor.

BUT, perhaps, it may be objected that the laws of property, while good for those who have great possessions, press hardly on those who have none: that the poor man is really poorer and more unhappy than he would be without any such laws.

Now, by creating property, the laws have created wealth; while, so far as poverty is concerned, it is not the work of the laws at all—it is the original condition of mankind. The man who lives only from hand to mouth is exactly in the position of man in the state of nature—the savage. In an artificial state of society, the poor man, I admit, gains nothing save by painful toil; but, even in a state of nature, what could he obtain save by the sweat of his brow? Is the chase without its fatigues, fishing without its risks, or war without its perils and uncertainties? And though men seem to love a life of adventure and have an instinctive passion for these dangerous pursuits; though the savage revels in his idleness, so dearly bought; must we thence conclude that wandering tribesmen are, of necessity, happier than the tillers of our own soil? No. The work of our peasants is more monotonous, but their reward is better assured: the lot of their womankind is not so hard: there are more expedients for support, in case of infancy or old age: the rate of increase in population is infinitely greater—and this circumstance alone would suffice to show on which side superiority of happiness lies.

Thus we see that the laws, while creating wealth, have at the same time proved benefactors to those who remain in their original condition of poverty. Even the very poor share, more or less, in the pleasures, advantages, and resources, of civilized society: by their toil and industry they may sometimes even aspire to amass a little fortune. Do they not enjoy the pleasures of acquisition; do not the pleasures of hope mingle with their labours? Nor is the security which the law confers upon them a less important factor. Those who look down from a height on the lower orders see every object smaller than it really is; but as we approach the base of the pyramid, it is its summit which, in turn, disappears. So far from drawing these comparisons, the poor do not even dream of making them; they do not allow themselves to be made miserable by visions impossible of realization.

True position of the poor.

Indeed, when everything is taken into account, the safeguards of the law may, perhaps, contribute as much to the happiness of the cottage as to the safety of the palace.

It is surprising that so judicious a writer as Beccaria should have inserted in a work dictated by the soundest philosophy a doubt which is really subversive of social order. 'The right of property,' says he, 'is a terrible right, and one which, perchance, may be unnecessary.'<sup>1</sup> Upon this right, tyrannical laws leading to much bloodshed have, doubtless, been founded; it has been shockingly abused. But the right itself presents only ideas of pleasure, abundance, and security. It is this right which has conquered our natural aversion from toil, and given to man the empire of the world; it is this right which led nations to abandon the life of nomads, and gave birth to love of fatherland and our fostering solicitude for the happiness of posterity. To enjoy quickly—to enjoy without labour

Mistaken view of Beccaria.

<sup>1</sup> *Crimes and Punishments*, chap. xxii., 'Of Robbery' (edition of 1804, p. 80). (C. M. A.)

—such is the universal desire of mankind. It is not the right of property, but this desire, which is so terrible; for it tends to set all those who have nothing in arms against all those who have anything. Now, a law which restrains such a desire is, surely, the most splendid triumph of humanity over itself.

## CHAPTER X.

### ANALYSIS OF THE EVILS RESULTING FROM ATTACKS UPON PROPERTY.

WE have already seen that subsistence depends upon the laws which secure to the labourer the products of his toil; but it seems fitting to analyze more closely the evils which result from violations of property. They may be reduced to four heads:

1. *Evil of Non-Possession.*—If the acquisition of a portion of wealth is a 'good,' it follows that the non-possession of it is an 'evil'; though, of course, nothing more than a negative evil. Hence, although men in their original state of poverty could not have felt the want of particular kinds of property as yet quite unknown to them, it is clear that they lost all the happiness resulting from possession, such as we now enjoy.

The loss of a portion of good must still be a loss, although we may always remain in ignorance of it. If by calumnious reports you deter my friend from leaving me a legacy which I did not expect, is not that doing me an injury? In what does the injury consist? Why, in the negative evil which results to me from not possessing what I should have possessed but for your calumnies.

2. *Pain of Losing.*—Everything which I possess, or to which I have a title, I think of, in my own mind, as being destined to belong to me for ever. These things I account the groundwork of my expectations—the hope of those dependent upon me, and the means of carrying out the plan of life mapped out for myself. Each part of my



property may, beyond its intrinsic value, have for me a value resting on personal association; as being, *e.g.*, a family estate, the reward of my own labours, or a provision for the future of my children. It represents, in my eyes, the part of myself which I have put into it—my cares, my toil, the economy which resisted the pleasures of the moment that they might be long drawn out in the days to come. In this way property becomes part of our very being, and cannot be wrested from us without wounding to the quick.

Fear of  
Loss.

3. *Fear of Losing*.—To our concern for the loss already sustained is added uneasiness as to the property still remaining, and even as to that to be hereafter acquired. Indeed, since most of the objects necessary for subsistence and abundance are perishable articles, future acquisitions form a necessary supplement to present possessions. Moreover, when insecurity reaches a certain point, the fear of losing impairs the enjoyment of property actually in possession; for our anxiety to preserve it condemns us to a thousand preventive measures, vexatious and irksome in themselves, and always liable to miscarry. Treasures are secretly conveyed away or buried: our enjoyment of them becomes sombre, stealthy, and solitary, and is afraid to display itself lest cupidity should be apprised of the whereabouts of its prey.

Abatement  
of Industry.

4. *Abatement of Industry*.—If I once lose the hope of assuring to myself the products of my toil, I shall seek only to live from day to day, and become unwilling to undergo labours for the benefit of my enemies. Moreover, mere willingness to work is not enough. I must needs have the means also; and whilst these are being provided subsistence is necessary. So that, without quenching my zeal for industry, without even destroying my willingness to labour, a single loss may reduce me to the position of not being able to do anything.

Thus, while the first three of these evils affect only a

man's passive faculties, the fourth assails his active faculties, and more or less benumbs them.

From this analysis it appears that the first two of these evils do not extend beyond the individual actually injured, but the last two spread throughout society and occupy indefinite space. Any attack directed against a man's property excites alarm and distrust in property-owners generally: the sentiment is imparted by neighbour to neighbour, and the contagion at last may reach the whole body of the community.

For the development of Industry, we must have the union of *power* and *will*. 'Will' depends upon the encouragements received; 'power' upon the means afforded. These means are what is called, in the language of political economy, 'productive capital.' In regard to an individual, his productive capital may be wiped out by a single loss, without his zeal for industry being destroyed or even impaired. In regard to a community, the complete annihilation of its productive capital is impossible; but long before that disaster could occur, the mischief may have reached the 'will,' and the spirit of industry be thus infected with fatal decay, even in the midst of natural resources drawn from a rich and fertile soil. The 'will,' however, is excited by so many stimulants, that it is able to resist with success a thousand discouragements: a passing calamity, howsoever great it may be, will not destroy a people's zeal for industry. After devastating wars have drained the coffers of a nation, the spirit of industry has been seen to rise up unimpaired; just as some mighty oak, torn by the gale, swiftly repairs its losses, and once more spreads its swelling branches to the storm.

Indeed, nothing will suffice for the complete paralysis of industry save the operation of some domestic and permanent cause; such as tyrannical government, bad legislation, an intolerant religion which is repellent to men's minds, or some ridiculous superstition which deadens their understanding.

Develop-  
ment of  
Industry.  
'Productive  
Capital.'

Paralysis of  
Industry  
by tyrannical  
government, etc.

A certain degree of apprehension will no doubt be excited by the very first attack directed against property: some timid souls will surely lose heart. If a second outrage follows in quick succession, the alarm will be greater and more widely spread. The more prudent then begin to curtail their enterprises, and by degrees will altogether abandon careers attended by so much uncertainty. This upheaval and the paralysis consequent on the destruction of commerce will extend in proportion to the frequency of the attacks, and may be vastly increased should the system of oppression assume a habitual character.

No one takes the place of him who has gone, while those who remain will fall into a state of lethargy. It is in this way that the field of industry, beaten by storms, at length becomes a barren desert.

The rule of  
the Turk.

Take Asia Minor, Greece, Egypt, the coasts of Africa. When the Roman Empire flourished, how rich were they in agriculture, commerce, and men! What have they become under the despotic rule of the Turk? Huts take the place of palaces, and villages are found where once great cities stood. This government, hateful to all thinking men, has never understood that a State can become rich in no other wise than by maintaining an inviolable respect for the rights of property. It has always supposed that there are only two secrets of statecraft: to drain the resources of the people, and to deaden their understanding. Thus it is that the fairest countries in the world, laid waste, barren, and almost deserted, can scarce be recognized in the hands of their barbarous conquerors. Nor can these evils be rightly assigned to causes more remote. Civil wars, foreign invasion, the scourges of nature, will doubtless serve to disperse wealth, put the arts to flight, and swallow up great cities; yet all these ravages will in course of time be repaired—communications will be re-established, languishing manufactures will revive, and cities will rise again from their ruins—if men but continue to be men.

Alas ! they are so no longer in these unhappy lands, where despair, the fatal, if tardy, effect of prolonged insecurity, has destroyed every active faculty of mind.

Should we seek to trace the history of this contagious mischief, we shall find that it first assails the more thriving classes of society; opulence is the object of its first attacks, and by slow degrees, superfluous wealth seems to disappear altogether.

Progress of  
the Para-  
lysis of  
Industry.

Sheer want still makes its voice heard, in spite of every obstacle; for man must live. But when man is forced to content himself with a bare subsistence, the State is like to die; while faint and few are the sparks that fly from the flickering torch of industry.

Besides, abundance is never so distinct from subsistence that the one can be attacked without striking a dangerous blow at the other. While some are losing only what is superfluous, others lose some portion of what is necessary for their support; for, by reason of the infinite complexity of economic relations, the superfluous wealth of one class of citizens is the only source from which a more numerous class can derive subsistence.

But we may draw another picture, more pleasing and not less instructive: a picture of the progress of 'security,' and of prosperity, its inseparable companion. North America supplies us with a most striking contrast; for there the savage in his natural state stands side by side with civilization. The interior of that vast region presents only an awe-inspiring solitude; impenetrable forests or barren plains, stagnant waters, noisome vapours, and noxious reptiles—such is the land when left to itself.

Progress of  
develop-  
ment of  
Prosperity.  
'North  
America.'

The fierce hordes who range these deserts without fixed habitation, occupied only in the pursuit of prey and ever embroiled in undying feuds, never meet but in open strife, and often succeed in utterly destroying each other. The wild beasts are, indeed, not so dangerous to man as man is to himself.



But, upon the very borders of these dismal regions, what a different prospect meets our gaze ! We seem to embrace, in a single glance, the two empires of good and evil. Forests have given place to lands in tillage ; while the site of marshes, now drained and dry, is occupied by meadows, pastures, domestic animals, and pleasant, healthy homesteads. Here, too, rising cities are being reared upon regular plans, and spacious roadways constructed to afford the necessary means of communication ; everything shows how men, seeking opportunities of mutual intercourse, have ceased to fear each other and to live by murder and pillage. Hospitable harbours, filled with shipping, give a welcome to the merchandise of the world and assist in the exchange of every kind of wealth. An immense population, living in peace and abundance upon the fruits of its own labour, has succeeded tribes of men who followed the chase and were ever scourged by war and famine. What has brought about these wonders ? What is it that has thus changed the surface of the earth ? What has bestowed on man this dominion over nature—splendid, fruitful, and complete ? The beneficent genius is ‘Security’ : security alone has wrought this glorious change. And how rapidly the change has come ! It is not yet two centuries since William Penn landed on those then barbaric shores with a colony of men who were, indeed, true conquerors ; for they were men of peace, who scorned to sully the new settlement by any show of violence, and yet gained vast power and respect by the constant exercise of benevolence and justice.

## CHAPTER XI.

### SECURITY AND EQUALITY IN OPPOSITION.

ANXIOUS to act with due regard to this great principle of Security, what should be the ordinances of the legislator in respect to the mass of property already in existence ? He ought to maintain the distribution as it is actually established. It is this which, under the name of 'Justice,' is rightly regarded as his first duty. The rule is general and simple, applicable to every country, and capable of being adapted to all schemes of ownership, even such as are in direct conflict with each other.

The condition of property in America, England, Hungary, and Russia, differs as widely and fundamentally as it well can. Speaking generally, the cultivator of the surface is, in the first of these countries, a proprietor; in the second, a tenant farmer; in the third, a serf; and in the fourth, a slave. Nevertheless, the supreme principle of Security requires that we should maintain all these modes of distribution, widely different as their characteristics are, and though they do not severally give rise to a like amount of happiness. How is it possible to make a fresh distribution without taking from somebody what he already possesses ? How can you despoil one man without assailing the security of all ? When your fresh partition comes to be disarranged—as it certainly will be, the very day after it has been settled—how can you avoid having to make a second ? What reason could you give for not readjusting the dislocated distribution ? And what becomes, meanwhile, of security, industry, happiness ?

Duty to maintain existing Distribution.

Impracticability of a fresh distribution.

Security  
must pre-  
vail over  
Equality.

When security and equality come in conflict, there should not be a moment's hesitation. Equality must give way. Security is the groundwork of life: subsistence, abundance, happiness, all depend upon it.

Equality, it is true, affects our well-being, but only in partial measure. Besides, whatever we may do, it will never be complete; for if equality could subsist for a single day, the vicissitudes of the morrow would bring about a change. The establishment of equality is but a chimera: all we can do is to diminish inequality.<sup>1</sup> If some violent cause, such as open rebellion or subjugation by force of arms, chances to throw the rights of property into confusion, it is, doubtless, a great calamity. But the mischief is not lasting: time will serve to mitigate or, even, to repair it. Industry is a plant of vigorous growth; it will survive many a lopping, and, with the returning warmth of summer, the nourishing sap will once more mount its stem. But if property were to be overthrown with the express intention of establishing equality of fortune, the evil would be irreparable. No more security—no more industry—no more abundance: society would once again revert to the state of savagery from which it has emerged.

‘Devant eux des cités, derrière eux des deserts.’

Equality  
could never  
be main-  
tained.

Such is the history of fanaticism. If equality ought to prevail to-day, it ought, by parity of reasoning, to prevail

<sup>1</sup> Bentham here touches upon what is now vaguely spoken of as ‘Socialism.’ ‘Modern States are coming more and more in various ways to interfere with industrial operations or their products, with the result and sometimes the intention, of effecting a more equitable and more socially advantageous distribution of wealth’ (*The Industrial System*, by J. A. Hobson, p. 213). Mr. Hobson distinguishes three chief modes of distribution, though each has, of course, other aims besides that of affecting distribution: (1) State regulation of industry; as, *e.g.*, minimum rates established under the Trade Boards Act, 1909, and the Coal Mines (Minimum Wage) Act, 1912. (2) State operation of industry, generally with the object of diverting to the public use monopoly profits which were left in private hands; as, *e.g.*, the assumption of the ownership and control of services of transport and communication, or the supply of gas, water, electricity, etc. (3) Taxation in order to raise revenue for public consumption; as, *e.g.*, income tax, the death duties, and the taxation of land values. (C. M. A.)

for ever. But it could only be maintained by renewals of violence such as would be necessary to establish it. We should need an army of inquisitors and hangmen, deaf alike to piteous appeal and to railing accusation, insensible to alluring pleasures, inaccessible to personal influence, endued with all the virtues, yet engaged in a service which would kill them every one. Some great levelling machine would need to be incessantly at work, planing down everything which showed itself above the mark prescribed; constant watch would have to be set for the purpose of supplying those who had squandered their shares, and of despoiling those who, by dint of strenuous toil, had increased their possessions. In such a state of affairs, the path of wisdom would lead to prodigality, the path of folly to industry. The pretended remedy, at the first blush so attractive, would thus be found a deadly poison—a burning cautery, which consumes everything until, at last, it seizes upon the primary elements of life itself. It is a thousand times more to be dreaded than an enemy's sword, though wielded with frenzied hate; for the sword inflicts but minor evils such as time may efface and industry repair.

Certain small societies, in the fervour of new-born religious enthusiasm, have been known to institute community of goods as a fundamental principle. Can anyone suppose that happiness has been attained by such an arrangement? The alluring motive of reward is, in such cases as these, supplanted by the afflicting motive of punishment. It becomes necessary to represent labour, so easy and pleasant when gladdened by hope, as a sort of penance that a man must undergo unless he would perish everlastingly. Accordingly, so long as the religious impulse retains its force, everyone works, but everyone groans. Now, suppose that same impulse should begin to lose its power in certain quarters: the society is then divided into two classes; one, a set of debased fanatics, acquire the faults and vices of a degrading superstition; the other

Community  
of Goods in  
religious  
societies.



Community  
of Goods in  
religious  
societies—  
*contd.*

consists of lazy rogues, who contrive to get themselves maintained in a state of sanctified indolence by the sorry dupes who surround them. Meanwhile, all their talk of equality has become a mere pretext—a cover for the outrage which idleness has perpetrated upon industry.

The expectations of brotherhood and loving-kindness, which have fascinated so many generous minds, are, under this system, but chimeras of the imagination. In the division of labour and in choice of the more arduous forms of toil, what would be the determining motive? Who would undertake servile and repulsive duties? Who would be content with his lot, and not find the burden of his neighbour lighter than his own? How many would be the frauds contrived to cast upon a man the labour of which his fellow would be rid? And, in the division of property, how impossible to satisfy everyone, to preserve even an appearance of equality, to prevent jealousies, quarrels, rivalry, undue preference! Who would determine the countless disputes and differences constantly arising? What a complex system of penal laws would be needed in the stead of smoothly-working liberty of choice, and as a substitute for such rewards as Nature will herself bestow, in return for the pains a man devotes to work chosen by himself! One-half of society would not be sufficient to govern the other half. So that this unjust and ridiculous system could not be maintained save by political or religious slavery; such as that of the helots at Lacedæmon, or of the Indians in the Jesuit settlement of Paraguay.<sup>1</sup> What are these schemes but sublime inventions of legislators who, professing to put into practice a theory of equality, make up two equal lots of good and evil, and then allot all the suffering to one side, and all the enjoyment to the other?

<sup>1</sup> Jesuit missionaries were sent to Paraguay in the later half of the sixteenth century; and in the seventeenth century the home government placed the whole administration, civil and religious, in the hands of the Jesuits, giving them the right to exclude all other Europeans. They were, however, expelled in 1768 and the province again made subject to the Spanish Viceroys. (C. M. A.)

## CHAPTER XII.

### THE RECONCILIATION OF SECURITY AND EQUALITY.

BETWEEN the two rivals, 'Security' and 'Equality,' must there, then, be constant opposition, eternal war? Up to a certain point they are clearly incompatible; but, with a little patience and skill, they may be gradually drawn towards reconciliation.

Reconciliation of Security and Equality.

Between these conflicting interests, time is the only mediator. If you would follow the counsels of equality without disregarding those of security, you must await the natural epoch, which puts an end alike to hope and to fear—the epoch of death.

When, by the death of the proprietor, property ceases to have an owner, the law may intervene in the ensuing distribution. This may be done either by limiting, in certain respects, the testamentary power, so as to prevent the too great accumulation of wealth in the hands of a single person; or by making the right of succession subservient to the dictates of equality, in cases where the deceased has no spouse or kinsman in direct line, and has made no use, by will, of his disposing power. We are, then, concerned with persons who acquire for the first time and have formed no previous expectations; so that equality may do what is best for everybody, without disappointing the hopes of anybody.

Application of principle of Equality on death of proprietor.

Here I do no more than indicate a principle: its developments will be seen in the Second Book (*Cf. post*, vol. i., p. 234).

When we come to deal with the adjustment of some kind of civil inequality, such as slavery, we must pay the same regard to the rights of property. We must be content to

Adjustment of civil inequality.

advance slowly and by short stages, and never lose sight of the principal object while pursuing a subordinate one. The men whom, by successive steps, we thus render free will be much more fitted to enjoy their liberty than if we had taught them to trample justice underfoot, while seeking to effect this change in their social condition.

Progress  
towards  
Equality is  
regular and  
continuous.

We should point out that, in a nation which is prospering by the development of agriculture, manufactures, and commerce, the progress towards equality is regular and continuous. If the laws do not stand in the way—if they do not maintain monopolies, hamper trade and free exchange, or suffer the creation of entails—we find great estates gradually split up, without effort, without revolution, without shock or disturbance; while, at the same time, a much greater number of men share in the advantages of a moderate fortune. Such, indeed, is the natural result of the widely diverse usages which prevail amongst the opulent and the very poor. Idle and prodigal, the man of great estate seeks only after enjoyment without toil; the poor man, inured to privations and obscurity, finds pleasure even in his labour and in the practice of economy. In this way, through the advancement of commerce and the arts, a great change has taken place in Europe, despite many obstacles raised by hampering laws.

We are not yet far removed, in point of time, from the feudal ages when the world was divided into two classes: a few great landowners, who were everybody, and a crowd of serfs, who were nobody. Where they have not disappeared altogether, those lofty pyramids have been brought low; and from their ruins, scattered in every direction, industrious men have raised up fresh and stable institutions, the vast number of which vouches the comparative happiness of modern civilization. Hence we may conclude that 'Security,' while holding its place as the supreme principle, conduces indirectly to 'Equality'; though Equality, if accepted as the basis of our social organization, would destroy both itself and Security, at one and the same time.

## CHAPTER XIII.

### SACRIFICES OF SECURITY TO SECURITY.

At first sight this title appears enigmatical; but the enigma is one that it is easy enough to interpret.

Sacrifice of  
part to  
preserve  
the rest.

An important distinction exists between the ideal perfection of security and the most perfect security that can, in fact, be attained. The one would require that nothing should ever be taken away from anybody; the other is gained if nothing be taken beyond what is necessary for the preservation of the rest.

This sacrifice of a part is not an attack upon security; it is simply an abstraction, or defalcation, from it. For an attack is an unforeseen shock, a mischief that cannot be reckoned with, a disorder arising no one knows how; it seems like to imperil everything, and so causes general alarm. But the abstraction or defalcation is a fixed, necessary deduction—expected and regular—which produces, it is true, an evil of the first order, but no danger, no alarm, no discouragement to industry. The exaction of a given sum of money will assume one or other of these characters, according to the circumstances in which it is levied, and will, as the case may be, give rise either to the deadening effects of insecurity or to the enlivening effects of public confidence.

The necessity for such abstractions is manifest. Working, and safeguarding the workers, are two distinct and, for a while, apparently incompatible operations; so that those who produce wealth by their labour must needs give up some portion of it to provide adequate supplies for the

Necessity  
for such  
sacrifices.



guardians of the state. Wealth can only be defended at the expense of wealth.

When society is assailed by enemies, whether internal or external, it can only maintain itself at the expense of security; not merely the security of its enemies, but the security of the very persons it is concerned to protect. If there be any who do not see that this result is inevitable, it is because in this matter, as in so many others, they allow the wants of to-day to eclipse or overshadow those of to-morrow. Indeed, Government is but a connected series of such sacrifices; the best Government being one in which they are reduced to a minimum. The practical perfection of security is, as it were, a quantity which constantly tends to approach ideal perfection without ever being able to reach it.

‘We must not increase the real wants of the people in order to satisfy imaginary wants of the state. By imaginary wants I mean such as are created by the passions and frailties of the ruling caste—the attraction of some unusual enterprise, the pernicious lust of empty glory, or the sort of mental imbecility which favours fantastic schemes. It has often happened that restless spirits, placed by a Prince at the head of affairs, have imagined that the wants of their own ignoble souls were really wants of the state.’<sup>1</sup>

The author of the *Persian Letters* has supplied too many of the chapters on the *Spirit of the Laws*. What can we learn from his satirical descriptions? If Montesquieu had been good enough to furnish a simple list of the true wants of the state, we should have better understood what he meant by imaginary wants.

I proceed to give a catalogue of the cases in which the sacrifice of some portion of security in the matter of

Cases in which sacrifice becomes necessary.

<sup>1</sup> Montesquieu's *Spirit of the Laws*, book xiii., chap. i., ‘Of the Public Revenues.’ His *Lettres Persanes* appeared in 1721, and had a very large sale. (C. M. A.)

property becomes necessary in order to secure the bulk of the property:

1. General wants of the state for defence against external enemies.

2. General wants of the state for defence against criminals or internal enemies.

3. General wants of the state to provide against physical calamities.

4. Penalties imposed on offenders either by way of punishment, or by way of compensation to injured parties.

5. Encroachments on the property of individuals to provide for the combating of the evils aforesaid, by means of powers exercised through Courts of Justice, the Police, and the Soldiery.

6. Limitations of a man's rights of property, or of the use which an owner may make of his own goods, imposed to prevent him from inflicting injury on himself or others.

We possess a general right of property in anything when we can apply it to any use we choose, except certain uses forbidden on special grounds. These grounds may be referred to three heads: (α) Private detriment; when a particular use would be injurious to some other person, either in his fortune or otherwise. *Sic utere tuo ut alium non lædas : sic utere tuo ut alienum non lædas.* (β) Public detriment; such as may result to the community in general. *Sic utere tuo ut rempublicam non lædas.* (γ) Detriment to the individual himself. *Sic utere tuo ut temetipsum non lædas.*

Limitation  
of general  
right of  
property.

This sword is mine in full property; but, plenary as that property may be so far as a thousand uses are concerned, I may not use it to wound my neighbour or to slash his vestment; nor may I brandish it as a token of rebellion against the Government. If I am a minor or a maniac, it may be taken from me lest I should injure myself. An absolute and unlimited right of property over any particular object would import the right of committing almost

any crime whatsoever. If I had such a right over the stick which I have just cut, I might employ it as a bludgeon to trounce the passers-by, or I might convert it into a sceptre as an emblem of royalty, or into an idol, and so give offence to those who profess the national religion.

In every one of the cases contained in the catalogue of sacrifices necessary for the security of property, the necessity is too palpable to require any proof. But it must be noted that similar reservations apply equally to other branches of security. For example, it is not possible to maintain the rights of person and of honour otherwise than by penal laws; and penal laws can rarely be enforced except at the expense of person or of honour.

## CHAPTER XIV.

### OF SOME CASES OPEN TO DISCUSSION.

OUGHT we to reckon among the wants of the state for which provision should be made, by forced contributions, the care of the poor, public worship, or the cultivation of science and art ?

#### § I. *Of Indigence.*

Even when social prosperity is at its highest point, the great mass of citizens will have no source of livelihood independent of their daily toil, so that they will always be on the brink of poverty; that is to say, they will always be liable to fall into that abyss, through some accident, some upheaval of trade, or some natural calamity, especially sickness.<sup>1</sup> During the period of infancy there is, as yet, no possibility of supplying the necessaries of life for oneself; while in the decay of old age it again becomes impossible to subsist without the support of others. The

State provision for the poor.

Infancy and old age

<sup>1</sup> In 1796 Pitt had introduced a measure which comprised a scheme for supplementing wages, by affording relief to every man who could not earn 'the full rate or wages usually given in his parish'—the 'Under-Ability or Supplemental Wages Clause,' as Bentham called it. The same Bill contained a clause for providing money to paupers to enable the purchase of a cow, for the constant maintenance of which, says Bentham, 'about *three acres* of land is looked upon as necessary.' Bentham denounced both these projects—the one as 'equalization,' the other as 'sentimentalism'; both as unfair and impracticable. The Bill also proposed to create a sort of Old Age Pension scheme embodying the provision of 'annuities humanely destined to diffuse a gleam of comfort over the evening of life.' According to Bentham, these were 'plans for throwing the parish upon the parish.' His criticisms were submitted in manuscript to the promoter of the Bill, but were not published until 1838. (C. M. A.)



two extremes of life are thus alike, in the matter of frailty and helplessness. It is true that natural instinct, humanity, and shame, conspire with the laws to assure to children and old folk the care and protection of their relatives, yet such aid is very precarious, and those who bestow it may soon be reduced to wanting help themselves. A large household, plentifully supplied by the toil of the two parents, may at any moment lose the half of its resources by the death of one parent, and then lose the whole by the death of the survivor.

The decay of life finds provision even less adequate than that of childhood. Love which descends is stronger than love which ascends: gratitude has not the force of instinct: hope centres round the frail beings upon whom life is dawning, but has no promise for men in the evening of their days. But suppose—as is, happily, often the case—suppose every possible care and comfort bestowed upon an aged person; the idea of assuming the rôle of recipient, instead of that of giver, will always impart a tinge of bitterness to the benefits received, especially at that period of decay when a certain morbid sensibility of mind seems to render painful a change which should really cause the old folk little concern.

Mere inaction will lead to destitution.

This aspect of social life is, perhaps, the saddest of all. We picture to ourselves the long train of evils which, by slow degrees, lead to destitution, and then to death in its most terrible forms. Through forces which never cease to work, mere inaction would, in itself, cause the lot of every mortal to gravitate towards this centre. If we would not be dragged into the abyss, there must be constant unremitting efforts to rise and escape from it; for we see, on all sides, the most diligent and worthy of men, now slipping slowly adown some deadly slope, now plunged headlong into the abyss by inevitable disaster.

Savings and voluntary contributions.

Apart from the operation of law, there are only two ways of combating these evils—viz., *savings* and *voluntary contributions*. If these two expedients proved, at all times,

adequate, we ought certainly to refrain from attempting to succour the poor by means of law. A law which offers to poverty aid independent of industry is, so to speak, a law directed against industry itself, or, at least, against frugality. The motive of labour and economy is present necessity, coupled with the fear of future want. A law which should take away this necessity and this fear would be an encouragement to waste and idleness. Such are the considerations which, reasonably enough, are urged, in reproach, against the greater number of institutions for the relief of the poor.

But a very slight examination will serve to establish the insufficiency of these two expedients, acting independently of law.

So far as 'savings' are concerned, if, in the case of a very large class, the greatest efforts of industry fail to afford daily maintenance, still less will they permit of any laying-by for the future. Another class may just be able to meet the daily charges out of the wages of each day's toil; but there is nothing to put aside, to be used in the purchase of necessaries at some future time. There only remains the third class, who are in a position to make some provision for future needs, by economizing during the years of toil so as to supply themselves when no longer able to work.

It is only in connection with this third class that a man's poverty can ever be reckoned any sort of crime. 'Economy,' it may be urged, 'is a duty imposed upon them; and if they have neglected it, so much the worse for them. Although poverty and death may await them, they can blame no one but themselves. Moreover, their sad fate will not prove an unmixed evil; for it will serve as a warning to spendthrifts. It has all come about in obedience to a law ordained by nature—a law which is not, like those of men, liable to prove uncertain or unjust in its operation. Punishment falls only on the guilty, and is proportioned exactly to their faults.'

'Savings' will not suffice to prevent destitution.

Is poverty to be reckoned a crime?

Is poverty  
a crime?—  
*contd.*

This stern language would be justifiable enough if the object of the law were vengeance. But the Principle of Utility condemns this same vengeance as a vile motive founded upon antipathy. Consider, too, what would be the fruit of these evils—of this destitution, of this poverty, which you, in your wrath, regard as the fitting punishment of prodigality. Are you quite sure that the sacrifice of these victims will, by force of example, obviate the commission of such faults as led to their misfortunes? To hold this view would display a very imperfect knowledge of the human heart.

The distress, the death, of a certain number of spendthrifts—if that term may properly be applied to unhappy wretches who cannot deny themselves the miserable petty pleasures of their condition, and know nothing of the difficult art of struggling against temptations of the moment by conscious mental effort—their distress, I say, nay, even their death, would have very little influence, as a moral lesson, upon the labouring classes. Indeed, many details of the sad spectacle would be hidden through shame, so that it cannot be likened to the ordinary punishments of a malefactor, which attract public attention and suffer none to miss their origin and significance.

Again, would not those who stood most in need of the lesson be ready to place on the event a more convenient interpretation? Would they always grasp the supposed connection between imprudence as cause and suffering as effect? Might they not attribute the catastrophe to accidents which were not, and could not have been, foreseen? Instead of saying: ‘Look at this man who has wrought his own ruin! his destitute condition ought to serve as a warning to me to work strenuously and to practise a rigid economy’—would they not often say, and with much show of reason: ‘Here is an unfortunate fellow who has given himself a vast deal of trouble, and all to no purpose. His case affords striking evidence of the vanity

of human prudence'? This would, doubtless, be bad reasoning; but should we punish thus rigorously a mere error in logic, the mere lack of reflective capacity; and that, too, in a class of men more often called upon to use their hands than their brains? Besides, what are we to think of a punishment designed to overcome the sovereign power of most imperious motives operating at one end of life (that is to say, in youth), when it is delayed in its execution until the other end is reached (that is to say, until old age)? How greatly would this delay destroy the force of the supposed lesson! How slight is the analogy between an old man and a young one! The one will not serve as a pattern, nor act as a warning, to the other. In youth, the ideas of present good and imminent evil, filling the whole sphere of reflection, exclude all ideas of more distant good or evil. If you would act upon a young man, place the motive hard by; show him, for example, the prospect of a marriage, or some other pleasure to be presently enjoyed. But a punishment, fixed for a time so distant as to be beyond his mental horizon, is a punishment appointed to no purpose. Our concern is to influence men who think very little; whereas, if their lesson is to be taught by a picture of suffering in the remote future, they must needs be men who think a great deal. What, then, I would ask, is the use of a political expedient, designed to affect the class least prone to forethought, if it is of a nature to be efficacious only when applied to wise and prudent men?

*Recapitulation.*—The resource of 'savings' will not suffice. First, this is obvious in the case of those who do not earn a living; and, secondly, equally so in the case of those who earn a bare subsistence. As to the third class, which embraces all those not comprised in the first two, the resource of 'savings' is not, in the nature of things, inadequate; but it becomes so, to a considerable extent, by reason of inherent defects in the development of human foresight.

Recapitulation.



\* Voluntary  
contribu-  
tions.\*

Their un-  
certainty.

Let us proceed to the other resource—‘voluntary contributions.’ That, too, has many imperfections.

1. Its *uncertainty*. It will undergo daily variations, dependent on the fortune and the generosity of the contributors. If the sum contributed prove insufficient, there is a crisis marked by misery and death. Should it chance to provide more than enough, it places a premium on idleness and prodigality.

Inequality  
of burden.

2. The *inequality* of the burden. Any such additional provision for the wants of the poor is made at the expense of the most humane and virtuous members of society, often out of all proportion to their means; while the niggards load all needy folk with obloquy, by way of covering their own refusal to assist with a varnish of system and reason. Such an arrangement is, therefore, a concession to selfishness, and a penalty imposed on humanity, the chiefest of all virtues.

I say a penalty, for, although such contributions are known as ‘voluntary,’ what is the source from which they spring? If it be not some fear of a religious or political origin, it is a tender but mournful sympathy, which directs these generous actions. It is not that we hope, at this price, to purchase a positive pleasure; yet we seek, by the sacrifice, to free ourselves from the distressful pains of pity. Indeed, it has been noticed in Scotland,<sup>1</sup> where destitution can look for nothing but this miserable form of relief, that the poor derive the greatest amount of succour from the classes which themselves verge upon poverty.

Difficulty  
of distribu-  
tion.

3. The *difficulties of distribution*. If these contributions are granted haphazard, as in the case of alms upon a highway, or if they are made direct by the donor, as occasion offers, without inquiry or the employment of an intermediary, the uncertainty as to the sufficiency of the grants is aggravated by a further uncertainty. In a vast number of cases, how will it be possible to determine the

<sup>1</sup> Cf. *post*, vol. ii., p. 212. (C. M. A.)

degree of need or the merits of the applicant ? May not the poor widow's mite go to swell the purse of some spend-thrift wanton ? Perhaps, as in the case of Sidney, many a generous heart will be found to push back from his own parched lips the life-giving cup, and cry : ' I can wait longer ; first serve yon poor fellow, who hath greater need than I.' Everybody must be aware that, on the distribution of charity haphazard, the largest share is not secured by modest virtue or by real poverty, which, indeed, is often silent and ashamed. Tactics and petty scheming are as necessary for success on this obscure stage as in the great world of fashion. The man who knows how to importune, to fawn, to lie, to join impudence with knavery, as occasion may require, and to give variety to his frauds, will achieve a success such as the virtuous poor, devoid of artifice and clinging to honour in the midst of poverty, will never attain.

' Les vrais talens se taisent et s'enfuient,  
Découragés des affronts qu'ils essuient.  
Les faux talens sont hardis, effrontés,  
Souples, adroits et jamais rebutés.' <sup>1</sup>

What Voltaire here says of talents may be applied to mendicity. In the distribution of voluntary contributions, the share of the poor fellow who chances to be decorous and virtuous will seldom equal that of the truculent or cringing beggar.

Should these contributions be deposited in a common fund to be afterwards distributed by nominated persons ? This method is greatly to be preferred, since it allows of a regular examination of the claimants and their needs, and tends to give a due proportion to the relief afforded. But it has also a tendency to diminish liberality ; for the gift which must, perforce, pass through the hands of others in such a way that one cannot follow its applica-

Common  
Fund for  
Relief of  
Poor.

<sup>1</sup> ' True merit holds its peace and shrinks aside,  
Browbeaten by the unworthy spurns it meets ;  
The counterfeit is bold and unabashed,  
Supple yet cunning, heedless of rebuffs.'

(*Trans.* by ROSE.)

tion nor enjoy, directly, the pleasure or the kudos attaching to it, has about it a certain abstract quality which serves to chill sentiment. What I give personally I give at the moment when my heart is full and the cry of some poor creature is wringing in my ears, when there is no one but me at hand to succour him in his distress. Anything I may subscribe to a general fund will have a destination not directly determined by my wishes: this small coin, which means much to me and to my family, will be but a drop in the ocean of contributions and of the wants to be supplied: surely it is for the rich to succour the poor! It is in this wise that many people reason, and it is on this account that a collection is more successful when subscribed for a specified class of persons than for an indefinite multitude, such as the whole mass of the poor. Is it, however, for this mass, as a body, that permanent aid must be assured.

Necessity  
for regular  
system of  
relief.

In view of these reflections, we may, as it seems to me, lay it down as a general principle of legislation that a regular system of contribution should be established for the relief of the poor; it being clearly understood that those only are to be regarded as poor who lack the necessities of life. From this definition it follows that the title of the poor man, as such, is stronger than the title of the owner of superfluous wealth; inasmuch as the penalty of death, which in the end would fall upon the starving poor, will always be a more serious evil than the penalty of disappointed expectation, which falls upon the rich man when a limited portion of his superfluous wealth is taken from him.<sup>1</sup>

Scale of  
compulsory  
contribution.

As to the scale of legal—that is to say, compulsory—contribution, it should not be in excess of simple necessities: to go beyond this would be to tax industry for the benefit

<sup>1</sup> If this deduction were put on a regular footing, each owner knowing beforehand what he would have to give, the pain of disappointment would disappear, and give place to another slightly different in its nature and less in degree (Dumont).

of sloth. Institutions where something more than necessities is supplied are to be approved only when supported at the charges of private individuals, who are in a position to discriminate in the administration of relief and apply it to prescribed classes of persons.

The details of the machinery for fixing this contribution and regulating the distribution belong to political economy; as also the investigation of means for encouraging, among the lower orders, a spirit of saving and foresight. We have, on this very interesting subject, some instructive memoirs, but no treatise which covers the whole question.<sup>1</sup> Such a book should begin with the theory of poverty—that is, with a classification of the poor and of the causes of destitution—so as to lead up to suggestions for preventive and remedial measures.

## § 2. *Of the Charges incidental to Public Worship.*

If we are to treat ministers of religion as supporting one of the sanctions of morality (the religious sanction), the cost of their maintenance ought to be referred to the same branch of administration as courts of justice and the police—that is to say, to that of internal security. The clergy are a body of moral teachers and overseers, who form, so to speak, the vanguard of the law. They have no authority to punish crime; but they fight against the faults in which crime originates, and, by encouraging obedience and the decencies of life, make rarer the occasions when it is necessary to invoke the aid of the law. If they were charged with all the duties that might reasonably be assigned to them, such as the education of the lower orders, the promulgation of the laws, and the keeping of certain

Charging  
cost of  
public  
worship or  
public  
funds.

<sup>1</sup> Mr. Bentham published a work on the subject after I had prepared the 'Principles of the Civil Code.' It has been translated into French, and was published by 'Citoyen' Duquesnoi, an. X. (Dumont). The title was *Esquisse d'un Ouvrage en Faveur des Pauvres*; and see the Letter addressed by Bentham, in 1799, to Arthur Young, editor of the *Annals of Agriculture* (Bowring, vol. viii., pp. 361, 369). (C. M. A.)



public registers, the utility of their ministrations would be still more manifest. The greater the number of real services they rendered to the state, the less often would they be afflicted by the maladies of dogmatism and disputation, which spring from a desire for distinction and from lack of useful occupations. We must needs direct their activities and ambition towards beneficial objects, if we would prevent them from becoming mischievous. If these relations were established, even those who will not allow that the religious sanction really rests on sacred verities could not complain should they be called upon to contribute towards the cost of maintenance, as they would then share in certain manifest advantages.

But if there should chance to be great diversity in creeds and forms of worship, and the legislator be not trammelled by an establishment already in existence or by other considerations peculiar to the particular country, it will be more conformable with liberty and equality to apply the contributions of each religious community to the support of its own church. It is true that, under this arrangement, we might have cause to fear the display of too much zeal in making proselytes; but it is also very probable that the competing efforts of the clergy would excite a wholesome spirit of emulation, and would set up, by the balance of influence, a sort of equilibrium in a sea of conflicting opinion, which is subject at times to very dangerous storms.

We may suggest a singularly unhappy situation: that of a people to whom the legislator forbids the public exercise of their own religion, while at the same time imposing on them an obligation to support a religion which they regard as hostile to their own. This would be a twofold violation of security. We should find that there had been aroused among this people a feeling of undying hate against the government, an ardent longing for some change, fierce courage, and profound secrecy. Deprived

Compelling support of religion which is not that of the majority.  
'Ireland.

of all the advantages of public worship, of the guidance of priests whom they could openly avow, the people would be in the hands of ignorant and fanatical leaders; and, as their religion could only be maintained and its rites practised by the aid of plots and conspiracies, the binding force of an oath, instead of being the safeguard of the state, would become a source of terror. So far from binding citizens to the government, the obligation of the oath would league them against it; and, thus, the people would become as formidable through their virtues as through their vices.

### § 3. *The Cultivation of the Arts and Sciences.*

I shall not speak, in this connection, of what should be done for the 'useful arts and sciences,' as they are called: no one denies that objects of public utility ought to be supported by public contributions.

Charging support of fine arts, etc., on public funds.

But when we come to deal with the cultivation of fine arts, the beautifying of a country, the building of lordly pleasure-houses, the purchase of articles designed to adorn or amuse—in a word, with works of supererogation—ought we to levy forced contributions? Can we justify the imposition of taxes for such splendid but superfluous objects?

I do not wish to put in a plea for the agreeable as against the useful;<sup>1</sup> nor to suggest that the people should be pinched to provide galas for courtiers or pensions for buffoons. But one or two reflections may be offered by way of apology.

1. The expense which is, or can be, incurred for these objects is commonly quite trifling, when compared with the aggregate of contributions for necessary purposes. If

<sup>1</sup> Not that there is any real opposition. Everything that gives pleasure is useful; but, in common parlance, we apply the word 'useful' exclusively to that which produces utility in the future, while the word 'agreeable' is limited to that which has immediate utility or produces present pleasure. Very many things to which we refuse the epithet 'useful' have, accordingly, a more definite utility than others to which it is applied (Dumont).

it were resolved to restore to each man his quota of this superfluous expenditure, would it not be impalpable ?

2. This additional contribution being lumped with the taxes raised for necessary purposes, its levy is not perceived. It excites no separate sensation such as could give rise to a definite remonstrance; and, as the evil of the first order is limited by the trifling amount of the charge, it could not suffice to produce an evil of the second order (*cf. ante*, p. 66).

3. The splendour of artistic display may prove of very palpable utility by attracting a swarm of foreigners, who will spend their money in the country. All nations, by degrees, become subject to the one which sways the sceptre of fashion. A country rich in amusements may be likened to a great theatre supported, in some measure, at the expense of a throng of curious spectators, drawn from all parts of the globe.

Pre-eminence in arts may procure goodwill of other nations.

Moreover, this pre-eminence in objects of taste, literature, and amusement, may chance to gain for a country the goodwill of other nations. Athens, which men called the Eye of Greece, was saved, more than once, by a sentiment of respect, inspired by the superiority of its civilization.<sup>1</sup> The halo of glory which encircled that land of the fine arts served for a long time to hide its infirmities; and all that did not pertain to barbarism felt concern for the preservation of a famous city, the centre of refinement and of intellectual enjoyment.

But essentials must be provided for in first instance.

But, after all, it must be allowed that this attractive object may, without danger, be left to the single resource

<sup>1</sup> *Cf.* Milton's sonnet, 'When the Assault was intended to the City': written in 1642.

'Lift not thy spear against the Muses' bower:  
The great Æmathian conqueror bid spare  
The house of Pindarus, when temple and tower  
Went to the ground: and the repeated air  
Of sad Electra's poet had the power  
To save the Athenian walls from ruin bare.'

See, however, Plutarch's account of the taking of Athens by Lysander, (C. M. A.)

of voluntary contributions. At any rate, before any charges are incurred for purposes of mere ornament, we must see to it that nothing essential has been neglected. It will be time enough to trouble about painters, players, and architects, when the public trust has been discharged; when private persons have been compensated for losses occasioned by war, crime, and physical disasters; when due provision has been made for the relief of the poor. Until these objects have been attained, to incur any such expenditure would be to accord to splendid accessories an undue preference over necessary undertakings. It would, too, be a step greatly at variance with the interests of the Sovereign; for it would certainly call forth reproaches of a most extravagant character, seeing that it needs no wit to indulge in them—nothing but fierce anger and the inclination to do so. We all know to what a pitch such tirades have been carried in our own day, in writings of coarse vigour, designed to inflame the people against the government of kings.

Yet, although everything conspires to involve monarchs in this particular mistake, have they ever, so far as the luxury of amusements is concerned, fallen into such excesses as many republics? At a period of direst peril, scouting alike the eloquence of Demosthenes and the threats of Philip, Athens was engrossed by a want more pressing than her own defence—by an object more vital than the maintenance of her liberty. It was accounted the gravest betrayal of trust to divert, even in the interests of the State, funds destined for the support of the theatre. And at Rome, was not this passion for spectacular display carried almost to the point of madness? In that city they must needs lavish the treasures of the world and the spoils of subject nations in hope to win the suffrages of the Sovereign People.<sup>1</sup> Terror spread through the land

Extravagance in Republics.

<sup>1</sup> Cf. the famous phrase of Juvenal, 'Duas tantum res anxius optat, panem et Circenses' (Sat. x. 80). Thus, *e.g.*, on the occasion of the dedi-



when it was noised abroad that some proconsul was to make a show at Rome; a single hour of splendour in the Circus plunged into despair a hundred thousand dwellers in the provinces.

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cation of the great amphitheatre (80 A.D.), Titus exhibited shows which lasted for a hundred days (Bury's *History of the Roman Empire*, pp. 382, 613). There were combats of gladiators, and five thousand animals were slain; the arena was then filled with water, and there was a representation of the sea-fight between the Corinthians and the Corcyræans recorded by Thucydides. At the end of the exhibitions, adds Professor Bury, tickets for a distribution of eatables were thrown to the populace. (C. M. A.)

## CHAPTER XV.

### SOME INSTANCES OF ATTACKS UPON SECURITY.

It will not be unprofitable to give some examples of what I call 'attacks upon security.' The principle itself will in this way be exhibited in a clearer light; while the examples will serve to show that what is unjust in morals can in no wise be harmless in politics. Nothing is more common than to sanction under one name that which would be hateful under another.

And at this point I cannot refrain from noting the bad effects of one branch of classical education. From our earliest youth we are accustomed to find, in the history of the Roman people, public acts of gross injustice, atrocious in themselves, invariably concealed under specious names, and always accompanied by a pompous eulogy on Roman virtues. The abolition of debts, for example, plays a conspicuous part in the early times of the Republic. The retirement of the people to Mount Aventine, when the enemy was at the gates of the city, forced the Senate to wipe out the rights and claims of creditors as with a sponge.<sup>1</sup> The historian seeks to enlist our sympathy with fraudulent debtors who discharged their debts by bankruptcy, and does not fail to expose to odium those who were despoiled by this act of violence. Now, what end was attained by this wrong? Usury, which had served as a pretext for the spoliation, would only become more excessive on the morrow of the catastrophe; for the exorbitant rate of

An effect of classical education. Acts of public injustice by the Greeks and Romans.

<sup>1</sup> During one of the wars with the Volscians the plebeians refused to fight against the enemy until the Consul Servilius had freed the debtors from prison and promised them his protection: cf. Smith's *History of the Ancient World* (4th edition), vol. ii., p. 231. (C. M. A.)

interest was nothing but the price paid to cover the risks attendant upon precarious engagements. Again, the establishment of Roman colonies has been paraded as an achievement displaying profound policy: it invariably consisted in stripping a number of the lawful occupiers of the conquered country in order to grant settlements to other persons as marks of favour or reward. This abuse of power, so cruel in its immediate operation, was not less calamitous in its consequences. The Romans were, indeed, wont to violate every right of property, and never knew where to stop in their headlong course. Hence arose the ceaseless cry for a fresh division of the lands, which served as an unquenchable firebrand in the hands of the seditious, and contributed, under the Triumvirs, to an appalling system of general confiscation. The history of the Grecian republics is filled with facts of the same kind, always presented in such plausible fashion as to lead shallow minds astray. How reasoning has been abused in relation to the division of lands effected by Lyeurgus!—a division designed to serve as a basis for his community of warriors, in which, with outrageous injustice, all the rights were on one side and all the servitude on the other.<sup>1</sup>

Similar  
acts of  
injustice  
by Eastern  
despots.

These 'attacks upon security,' which have found so many officious persons to uphold them where the Greeks and the Romans were concerned, have not met with the like indulgence when perpetrated by Oriental potentates. There is nothing attractive about the despotism of a single individual, because it is so manifestly personal to himself; there being a million chances of suffering from it to one of getting any benefit out of it. But despotism when exercised by the multitude deceives simple folk by a false

<sup>1</sup> Of all the institutions of Lyeurgus, this division of lands met with the least resistance. One can only explain this by supposing that, during a long period of anarchy, property had almost lost its value. In that case, even the rich might profit, for ten acres *secure* are worth more than a thousand *insecure* (Dumont). Almost every Spartan institution was ascribed to Lyeurgus. He is supposed to have lived about 800 B.C., but probably effected no such division. (C. M. A.)

image of the public weal: they rank themselves, in imagination, among the great number who are playing the tyrant, instead of supposing themselves among the small number who suffer and give way. Leaving, then, the sultans and viziers in peace, we may rest assured that their acts of injustice will not be invested by historians with a false lustre: their reputation will serve as an antidote to their example.

For the same reason we may refrain from treating such attacks upon security as national bankruptcies.

But we should note, in passing, a remarkable effect of the faithful adherence to engagements—an effect which extends even to the authority of the Sovereign himself. In England, since the Revolution, the engagements of the State have always been sacredly observed; so that private persons who deal with the Government have never sought any other security than their mortgage on the public revenues, while the collection of the taxes has, throughout, remained in the hands of the Crown. In France, under the monarchy, breaches of public faith were of such frequent occurrence that, from an early date, those who made advances to the Government were in the habit of arrogating to themselves the right of collecting the taxes, and of paying themselves with their own hands. But this intervention cost the people dear, for the lender had nothing to gain by consulting their interests; and it proved still more disastrous to the monarch, for it alienated from him the affection of his people. When, in our own days (1787), the announcement of a deficit caused consternation throughout the whole body of state creditors, that class, which, in England, are so concerned to maintain a stable form of government, showed themselves, in France, eager for revolution. Each member of the class expected to find security for his loan by taking away from the Sovereign the administration of finance and placing it in the hands of a national council. Everybody knows how far the event corresponded with these expectations. But it is none the less interesting to

Security of  
Government loans.  
England  
and France  
contrasted.



note that the downfall of the French monarchy, which seemed impregnable, was owing, in the first instance, to the distrust occasioned by repeated violations of public faith.

Among the manifold 'attacks upon security' which arise from ignorance, inadvertence, or mistaken reasoning, we will content ourselves with directing attention to a few:

1. We may include in this category all *taxes of which the incidence is unfair*; as, for example, disproportioned imposts, which spare the rich at the expense of the poor. The evil presses all the more hardly from a feeling of injustice at being constrained to pay a larger sum than would be demanded if everybody concerned paid in due proportion. 'Statute Labour' is the height of inequality, since it falls entirely upon those who have no other patrimony than their hands.<sup>1</sup>

Or take imposts charged upon property which is indeterminate or uncertain in its character; upon persons, possibly, who have no money wherewithal to pay. But the mischief then assumes another shape; for, although such persons escape taxation by reason of their poverty, they find themselves subject to still graver evils. In place of the inconvenience of a levy, they endure the pangs of privation. We thus see how ill-judged an impost is a 'poll-tax': the possession of a head does not proclaim the possession of property.

So, too, imposts which fetter industry, such as the creation of monopolies or close privileged corporations. The true way of looking at these taxes is to consider, not what they yield, but rather what they prevent being acquired.

Again, imposts on the necessities of life. No man can

<sup>1</sup> See, e.g., the statute 5 Eliz., c. 4, repealed in 1875. All persons fit for labour were compelled to serve by the day in the time of hay or corn harvest; from the middle of March to the middle of September labourers must work from 5 a.m. until 7 or 8 p.m., being allowed two hours for breakfast and dinner, and half an hour for sleeping during the three hot months; during the rest of the year the work lasted from twilight to twilight (except one and a half hours for breakfast and dinner) on pain of forfeiting one penny for every hour absent. (C. M. A.)

Taxes of  
unfair in-  
cidence.  
Ill-advised  
imposts.

tell what hardships, what maladies, may result—nay, even death itself. These are sufferings really caused by the folly of the Government, but often accounted as natural misfortunes which could not have been averted.

Imposts upon the sale of property alienated during life. It is commonly want which brings about such sales; and the Exchequer, by intervening at this distressful season, levies an extraordinary tax on personal misfortune.

Imposts upon public sales, or on goods sold by auction. Here the distress is very great and plain to be seen, while the fiscal injustice is also manifest.

And, lastly, taxes upon law proceedings.<sup>1</sup> These taxes embrace every species of attack upon security, seeing that they amount to a refusal of the protection of the law to all those who cannot afford to pay for it. They accordingly hold out to crime a hope of impunity; for it is only a matter of choosing, as the man to be wronged, one who cannot find the funds necessary for a prosecution, or, at any rate, is not in a position to incur the risks attendant on the institution of process.

2. *Forced Raising of the Value of Money.*—Another attack upon security. This is a bankruptcy, since the state does not pay all that it owes; and a fraudulent bankruptcy to boot, since there is a pretence of payment. It is, moreover, a silly fraud, because it deceives nobody. So far as it goes, the device amounts to an abolition of debts; for the speculation which the state practises on its creditors, it authorizes each of them to practise in turn upon his own creditors, and this without any gain to the public treasury. And when the tale of wrongs is complete! The operation having shaken public confidence, ruined honest citizens, enriched

Forced raising of money values.

<sup>1</sup> In 1795 Bentham had published an essay, printed in 1793, entitled '*A Protest against Law Taxes*, showing the peculiar mischievousness of all such impositions as add to the expense of appeal to Justice' (Bowring, ii. 573-583). Dumont inserted an abstract in an Appendix to his *Traité des Preuves Judiciaires* (1823). Merely putting in an answer to a bill in equity is said to have cost, in one case, more than £800. (C. M. A.)

rogues, deranged commerce, dislocated the scheme of taxation, and entailed a thousand personal misfortunes, does not leave the smallest advantage to the government which is dishonoured by it. Expenditure and income return to the same relative proportions as before.

Forced reduction in rate of interest.

3. *Forced Reduction of the Rate of Interest.*—From the point of view of political economy, to reduce the rate of interest by law is to make an attack upon wealth; because such an enactment tends to check the introduction of foreign capital, and represses, in some cases, new branches of commerce—aye, indeed, even old-established branches—should the legal interest prove insufficient to cover the risks incurred by those who provide the capital.<sup>1</sup> But, from the point of view of ‘security,’ which is our more immediate concern, it amounts to taking away from the lenders to give to the borrowers. If we suppose the rate of interest reduced by one-fifth, the result to the lenders is the same as if they were stripped by thieves, every year, of a fifth part of their income. Now, if it seems good to the Legislature to take away from a particular class of citizens a fifth part of their revenue, why stop there? Why not another fifth—and still another? If the first reduction answered its purpose, the further reduction will do so in like measure; and if the device be good in the one case, why should it be bad in the other? Wherever we stop, we should have a reason for stopping; but this reason, which debars us from taking the second step, ought to have been enough to prevent us from taking the first. Such an operation is on the same footing as

<sup>1</sup> Bentham’s *Defence of Usury, showing the Impolicy of the Present Legal Restraints on the Terms of Pecuniary Bargains* had been published early in 1788. J. S. Mill has described it as ‘Bentham’s triumphant onslaught, which may still be referred to as the best extant writing on the subject’ (*Political Economy*, book v., chap. x., § 2). The Usury Laws were, however, not abolished till 1854. But the Courts of Equity have long given relief against harsh and unconscionable bargains with expectant heirs; and, under the Money Lenders Act, 1900, if the interest or charges are excessive, or the transaction is such that a Court of Equity would give relief, the Court may reopen the transaction and relieve the debtor from payment of any sum in excess of that adjudged to be fairly due, having regard to all the circumstances of the case. (C. M. A.)



a decree which should reduce the rent under leases of farm lands, upon the pretext that the landowners are useless consumers while the farmers are productive workers. If you shatter the principle of security for one class of citizens, you shatter it for all: the bundle of concord is its emblem—  
 ‘United we stand, divided we fall.’

4. *General Confiscations*.—To this head I refer the vexatious oppression of a sect, a party, or a class of men, under the shadowy pretext of some political offence—where it is pretended that the confiscation is imposed as a punishment, although, in reality, the offence was invented to bring about the confiscation. History presents many examples of such depredations. The Jews have often been their victims; for the Jews were too rich not to be constantly guilty of such feigned offences! Financiers and farmers of the revenue have, in a similar way, been subjected to what were called *Chambres Ardentes*.<sup>1</sup> So long as the succession to the throne remains unsettled, everybody becomes liable, on the death of the king, to this form of persecution; and the spoils, snatched from the beaten party, form a hoard for distribution among the followers of the successor *de facto*. In a republic torn by factions, one half of the nation become rebels in the eyes of the other half; and, if a course of confiscations be introduced, the parties will, in turn, devour each other, as was the case in Rome.

General.  
confisca-  
tions.

These crimes on the part of those who are in a position to apply force, and, above all, the crimes of the popular party in a democracy, have never lacked apologists. ‘The greater part of these large fortunes,’ it is urged, ‘have been founded on injustice; and one may surely restore to the public what has been stolen from them.’ But this sort of reasoning offers a wide scope to tyranny: it would, indeed, allow men to presume crime, instead of proving it. If such

<sup>1</sup> *Chambres Ardentes* were formerly tribunals, which imposed punishment by fire for heresy and poisoning; but in later times the term was applied to the *Chambre de Justice*, which dealt with alleged acts of public malversation. (C. M. A.)



logic were to prevail, it would be impossible for a rich man ever to be free from sin. But, even if this were so, ought a grave penalty like confiscation to be inflicted wholesale, without inquiry, without particulars, without proof? Such conduct would be deemed heinous if directed against a single person—how can it become lawful by being directed against an entire order of citizens? Must we, perforce, shut our ears to complaints of wrongdoing, because they issue from a crowd of unhappy beings whose cries are confounded in their common shipwreck? To despoil the great landowners because their ancestors had, in some instances, acquired wealth by unjust means, is like bombarding a city because certain thieves are supposed to lie there in hiding.

5. *Dissolution of Convents and Monastic Orders.*—The decree of abolition was signed by Reason herself, but its execution should not have been handed over to Greed and Prejudice.<sup>1</sup> It would have been enough to debar the societies from admitting new members; for, in this way, they would have gradually disappeared, without inflicting any hardship on individuals. The revenues as they fell in might, then, have been applied to some useful object; and philosophy would have approved a proceeding admirable in principle and merciful in execution. But this is not the way Cupidity goes to work: the process is far too slow. It would almost seem that sovereigns, when they came to dissolve such societies, had wished to punish the members as though for some wrongs received at their hands. Instead of looking upon them as bereaved and disabled persons, who deserved all the compassion of the legislator, the authorities have treated them as enemies, who ought to think themselves quite fortunate, although reduced from opulence to a state of bare subsistence.

6. *Suppression of Pensions and Places without indemnifying those in Possession.*—This attack upon security

<sup>1</sup> In April, 1790, the French Assembly decreed the confiscation of all the property of the Church and an immediate sale of it, to the extent of 400 millions. (C. M. A.)

Dissolution  
of monas-  
teries.

Suppression  
of offices  
of profit  
without  
compensa-  
tion.

deserves very particular mention, seeing that it is often applauded as a stroke of excellent administration and sound economy, instead of being condemned as a palpable wrong. Envy is never more at ease than when hidden behind the mask of public welfare; but the general weal, although requiring that sinecures should be got rid of, does not demand the ruin of the present holders. The principle of security ordains that, in every measure of reform, the indemnity should be complete: the only benefit that may lawfully be derived is confined to the conversion of perpetual annuities into life annuities. It will be said that the peremptory abolition of such offices would be a gain to the public; but this is in the nature of a sophism. The sum of money in question, considered in itself, would, of course, be a gain if it came from abroad or were acquired in the way of trade. It is not, however, a gain when taken from the hands of certain individuals who themselves form part of the general public. Would a family be the richer if the father were to take everything from one of his children in order to make better provision for the others? And, indeed, in that case, the wrong done would serve some good purpose, for the stripping of one son would increase the heritage of his brothers. But when we come to deal with the abolition of a public office, the profits of the place are divided amongst the whole community, while the loss presses entirely on a single member. The gain, spread through the multitude, is split into impalpable parts, while the whole of the loss is felt by him who sustains it. In the result, then, those who gain are not enriched, and he who loses is made poor indeed. Instead of the abolition of a single sinecure, suppose a thousand, ten thousand, a hundred thousand. The aggregate of disadvantages will be similarly assessed; while the spoil taken from thousands of persons will be divided amongst millions. The public highways will exhibit to your view unfortunate citizens whom you have plunged into poverty: you will hardly

Abolition  
of sinecures  
—*contd.*

Abolition  
of sinecures  
—*contd.*

find a soul sensibly richer for your cruel reforms. Moans of grief and cries of despair will resound on every side: shouts of joy, if any such there be, will not betoken happiness, but the fierce hate which exults in the woes of its victims. You Ministers of Kings and of the People will never win the happiness of nations through the misery of individuals: the altar of the public good no more demands barbarous sacrifices than does the altar of a loving God.

I cannot even now quit this subject: it appears so essential, if we would establish the principle of security, to follow the trail of this error even unto its remotest lair.

Well, how does a man set about to delude himself, or to delude the people, in a manner involving such grave injustice? He has recourse to certain pompous maxims, mixtures of truth and falsehood, which give to a question, in itself quite simple, an air of profound political mystery. 'The interest of individuals,' it is said, 'must give way to the public interest.' But what does this amount to? Is not one individual as much a part of the public as another? The public interest, which you think fit to personify, is nothing more than an abstract term; it merely represents the aggregate of individual interests, and we must needs take them all into account, instead of treating some as everything and the others as nothing. If it were a good thing to sacrifice the property of one individual to augment the fortunes of others, it would be still better to sacrifice that of a second, and a third, say up to a hundred or a thousand, or beyond any assigned limit; for, whatever may be the number of those whom you have plundered, you will always have a like reason for adding one more. In a word, either the interest of the first must be regarded as sacred, or the interest of no one of the series can be so regarded.

Now, individual interests are the only real interests. Take care of the individual; do not vex or injure him, nor suffer him to be vexed or injured, and you will then have done enough for the public at large. Can it be credited

Private  
interest v.  
public  
interest.

that there are men so absurd as to love posterity better than the present generation; to prefer the man who does not exist to the man who does; to afflict the living under pretence of promoting the happiness of those who are not yet born, and perhaps may never be ?

On a vast number of occasions, men, though suffering from the operation of some law, have not dared to complain, or have found their complaints unheeded, owing to the vague and erroneous notion that private interest should yield to public interest. But if it comes to be a question of generosity, whom does it behove to exercise it ? Is it better that all should be generous to one, or that one should be generous to all ? Who is the more selfish—he who wishes to preserve what he has, or he who wishes to carry off, if need be by force, what belongs to another ? An injury felt, and an advantage not perceived—such is the outcome of the wonderful schemes whereby individuals are sacrificed to the public at large.

I shall conclude with an important and far-reaching observation. The greater the regard paid to the principle of property, the firmer its hold on the mind of the people. Slight attacks on this principle prepare the way for more determined ones. It has taken a long time to reach the point now attained in civilized societies; but a terrible example has shown us how readily the principle may be overthrown, and how easily the savage instinct of pillage assumes a mastery over the laws.<sup>1</sup> Peoples and governments are, in this respect, like tamed lions: if they but taste of blood, their natural ferocity revives.

Concluding  
observa-  
tion.

‘ Si torrida parvus  
Venit in ora cruor, redeunt rabiesque furorque;  
Admonitæque tument gustato sanguine fauces;  
Fervet et a trepido vix abstinet ira magistro.’<sup>2</sup>

<sup>1</sup> The reference is, of course, to the French Revolution, which had just come to an end. (C. M. A.)

<sup>2</sup> Lucan, *De Bello Civili*, lib. iv., ll. 239-242. (C. M. A.)



## CHAPTER XVI.

### OF FORCED EXCHANGES.

Compulsory  
Exchanges.

'XENOPHON tells us that Astyages once asked Cyrus for an account of his last lesson.<sup>1</sup> "It was," said Cyrus, "in this wise: A big boy in our school, having a little coat, gave it to a comrade of smaller stature, and took away his comrade's coat, which was larger. The master of the school, accordingly, referred the dispute that arose to my arbitrament; and I awarded that things should be left as they were, as both parties seemed better accommodated than before. Whereupon the master pointed out to me that I had done ill; for I had stopped short at considering the convenience of the thing, although I ought, in the first instance, to have had regard to justice, which would never suffer violence to be done to the property of any man"' (*Montaigne's Essays*, book. i., chap. xxiv.).

Let us pause to examine the award of Cyrus. At the first blush, a forced exchange would not appear to be any violation of security, provided that the article given is equal in value to that which is taken away. How can I be said to lose by reason of a law, if, after it has had its full effect, the amount of my fortune remains the same as before? If one party has gained, without the other being a loser, surely the transaction is, in all respects, satisfactory. No: that is not so. He, whom you suppose to have lost nothing by the forced exchange, may really have suffered loss. Inasmuch as everything, movable or immovable, may,

<sup>1</sup> According to Xenophon's account, Cyrus, the grandson of Astyages, was brought up at the court of his grandfather. But for the more accurate details of this story, see *Cyropædia*, book i. (iii.). (C. M. A.)

according to circumstances, have a different value for different persons, each owner has an expectation of profiting by some favourable chance, which will enhance the value of his particular piece of property. Thus, even if the house occupied by Peter would be more valuable to Paul than it is to Peter, that is no sufficient reason why, for the gratification of Paul, Peter should be forced to give up his house at a price representing its value to himself. That would be to deprive Peter of the benefit which he has a right to expect will accrue to him from the very circumstance that the house is worth more to Paul than it is to him. But suppose Paul should say that, for the sake of peace, he has offered a price beyond the market value of the house, and that Peter only refuses it out of obstinacy, we might then reply to him: 'It is, after all, merely a supposition on your part that the price you have offered is in excess of the market value. The opposite view is equally probable; for, if you have offered more than the house is really worth, Peter would surely have hastened to seize so favourable an opportunity—one which might never occur again—and the bargain would have been readily concluded. The fact that he does not accept shows that you were mistaken in your estimate; and that, if his house be taken from him on the terms you propose, an injury will be done to his fortune, not an injury perhaps to property actually in his possession, but, at any rate, an injury to property which he has a legitimate expectation of acquiring.'

'Not so,' Paul will reply: 'he knows well enough that my estimate is beyond any price he can obtain in the ordinary course of things; but he also knows my need, and, therefore, refuses a reasonable offer in the hope of deriving unfair advantage from my situation.'

I think there is a principle which may be applied to remove the difficulty thus arising between Peter and Paul. We must discriminate between two classes of objects:

When sales  
or ex-  
changes  
may be  
made com-  
pulsory.

Compulsory  
sales—  
contd.

(a) those which, in the ordinary course, have only their intrinsic value; and ( $\beta$ ) those which are susceptible of a value based on sentiment or on some extrinsic attribute. Houses of the common type, a field cultivated in the usual manner, a crop of corn or hay, ordinary manufactured products, seem to belong to the first class. To the second we may refer pleasure-grounds, a library, pictures, statues, natural history collections. In the case of objects within this second class, exchange ought never to be forced; for it is not possible to assess the value imported by sentiment or extrinsic attributes. But objects of the first class may well be made subject to forced exchange, whenever that is the only means of preventing great loss. Thus, suppose that I am the owner of a close of land of considerable value, to which the only approach is a roadway running along a river's bank. Suppose that the river, being in flood, destroys the roadway, and my neighbour stubbornly refuses me access over a tongue of land which is not worth a hundredth part of my close. Ought I to lose the whole benefit of my property through the spite or caprice of this stupid fellow? I should say that exchanges may be forced in order to prevent great loss; as where (in such a case as this) an estate is wholly deprived of access unless a right of way be granted across neighbouring land. But the principle is of so delicate a character that we must lay down very rigorous rules if it is not to be abused.<sup>1</sup>

Protection  
against  
forced ex-  
change  
under law  
of England.

If we would appreciate the great respect paid to property in England, we should note the scrupulous action of the

<sup>1</sup> In this connection reference may be made to the fixing of the value of the rupee and the closing of the Indian mints in 1893. Before that date silver was the standard of value in India, and, owing to the depreciation in the gold price of silver, the gold value of the rupee fell from over 2s. to under 1s. 3d. On the closing of the mints to the free coinage of silver, the demand for rupees outran the supply, and the gold value rose from 1s. 1d. in 1895 to 1s. 4d. in 1899. Since 1899 the rupee has been kept at this value by the Secretary of State for India selling, for gold in London, bills on India (which are in terms of rupees), or by the Government of India selling, for rupees in India, sterling drafts on London. (C. M. A.)

legislature in this matter. If a new road is to be opened, an Act of Parliament must be obtained, after all the parties interested have been heard. Nor is it considered enough to award suitable compensation to the landowners concerned; for objects which may have a sentimental value, such as houses and gardens, are protected by means of special exceptions.

Forced exchanges may also be justified whenever it is plain that the obstinacy of a single individual or of a small body of persons operates to affect injuriously the interests of a large number. It is in this way that the opposition of a few proprietors has not been allowed to prevent the clearance and enclosure of common lands in England; where, moreover, there is often a compulsory sale of houses, if necessary for the health or convenience of the general body of citizens.<sup>1</sup>

Compulsion  
justified in  
the public  
interest.

It is to be noted that we have been dealing with compulsory exchanges, and not with forcible removals; for a removal which is not an exchange—that is to say, a removal without an equivalent—even if it results in advantage to the State, is a mere act of injustice, an exertion of power without the alleviations necessary to reconcile it with the principle of Utility.

<sup>1</sup> In the eighteenth century a large number of private Inclosure Acts had been passed; and the 'enclosure movement' was greatly facilitated by the general Inclosure (Consolidation) Act of 1801 (41 Geo. III., c. 109). After Bentham's death this principle was extensively applied in many statutes—*e.g.*, the Lands Clauses and Railway Clauses Consolidation Acts of 1847. Compare also the Indian Land Acquisition Act 1894 (Act No. 1 of 1894), which repeals a statute of 1870, amends the law for the acquisition of land for public purposes and for Companies, and determines the amount of compensation to be made on account of such acquisition. (C. M. A.)



## CHAPTER XVII.

### POWER OF THE LAWS OVER EXPECTATION.

Laws  
should  
conform  
with  
general  
expecta-  
tions.

THE legislator has no title to lord it over the dispositions of the human heart; rather is it his function to interpret and minister to them. The excellence of his laws depends upon their conformity with general 'expectation.' It behoves him, therefore, to mark well the trend of this expectation, so that he may act in harmony with it. Such is the end in view: let us now examine the conditions necessary for its attainment.

Laws  
should  
precede  
formation  
of expecta-  
tion.

1. The first of these conditions—and the one most difficult to fulfil—is that 'the making of the laws should precede the formation of expectation.' If we could conceive a new people, a race of children, the legislator, finding no expectations in existence to thwart his plans, might fashion them at his pleasure, as the sculptor shapes a block of marble. But, as there already exists in every clime a multitude of expectations, based upon ancient laws or time-honoured customs, the legislator is obliged to pursue a system of conciliation and concession, which hampers him at every turn.<sup>1</sup>

The very first laws found some expectations already fully formed; for, as we have seen, there was a shadowy kind of property even in primeval times—that is to say, some slight expectation of keeping what had been already acquired. And it was this anterior expectation which

<sup>1</sup> Cf. 'Every nation is liable to have its prejudices and its caprices, which it is the business of the legislator to look out for, to study, and to cure' (*Introduction to the Principles of Morals and Legislation*, chap. xv. 24). (C. M. A.)

determined the direction of the earliest laws; while they, in turn, gave birth to fresh expectations, hollowing out the channel in which the hopes and desires of mankind were destined to flow. Nowadays, it is impossible to make any change in the laws of property without obstructing, more or less, the existing current, and finding that it offers to the proposed reform some appreciable resistance.

Suppose that you are called upon to ordain a law in conflict with the established expectations of the people. If it be possible, you should so arrange that the law does not come into force for a long time; and in this way the present generation will not feel the change, while the rising generation will be quite prepared for it.<sup>1</sup> You will find among the younger generation some who will side with you in your fight against old-fashioned views; and you will have done no wrong to existing interests, because there will be time enough to prepare for the new order of things. Everything, in fact, will be plain-sailing for you, as you will have, thus, prevented the rise of expectations with which you would otherwise have had to reckon.

If a law conflicts with expectation, its operation should be deferred.

2. The second condition is that 'the laws should be known.' A law which is not known can, of course, have no effect upon expectation; it will not serve to prevent a conflicting expectation. It will be said that this condition does not depend upon the nature of the law at all, but upon the measures taken to promulgate it; and these measures may be quite satisfactory, whatever the law may be. This reasoning is less sound than specious. There are some laws which, in the nature of things, become known more readily than others; that is to say, such laws as are conformable with expectations already formed, laws which rest upon 'natural expectations.' This natural expectation, this expectation induced by early habits and associations, may be founded on superstition, on a baneful preju-

Laws should be promulgated; and this is easier when they conform with expectation.

<sup>1</sup> Cf., e.g., as to the dissolution of convents and monastic orders, 'Civil Code,' Part I., chap. xv (5), *ante*, p. 188. (C. M. A.)

dice, or on some perception of utility, it makes no matter which it be; anyhow, a law which conforms with it implants itself in the mind without effort; it was there, so to speak, before it was promulgated, or had even received the sanction of the legislature. But, when the law is in conflict with this natural expectation, it is very difficult to grasp and understand, and still more difficult to fix in the memory. Some other arrangement is always presenting itself to the mind; while the new law, altogether strange and without any proper roots, tends constantly to slip away from a spot to which it has no natural attachment.

Codes of mere ritual observance have this inconvenience, amongst others, that their arbitrary and fantastic rules, never being well known, weary the mind and tax the memory; so that the man who is subject to them, always fearful, always at fault, always fancying himself morally diseased, can never account himself free from sin, and lives in perpetual need of absolution.

Natural expectation is directed towards such laws as are of the greatest import to the community at large; and, if a foreigner were guilty of theft, forgery, or murder, he could not be heard to plead ignorance of the laws of the country, since he could not fail to know that acts so manifestly noxious are crimes in every state.

3. The third condition is that 'the laws should be consistent.' Now, this principle is closely related to the condition immediately preceding; but it serves to place a great truth in a new light. When once the laws have been established in accordance with a certain definite arrangement and upon a principle generally admitted, any further arrangement consistent with that principle will naturally be found to conform with general expectation. Every analogous law is, so to speak, taken for granted beforehand, and every new application of the principle helps to confirm and strengthen it. But a law which is not of this character dwells apart, as it were, in the mind,

Incon-  
venience of  
codes full of  
ritual ob-  
servances.

Laws  
should be  
consistent.

and the influence of the principle to which it stands opposed is a force constantly tending to drive it from the memory.

Thus, that a man's property should, at his death, pass to those most nearly related to him is a rule of general acceptance, and one on which expectations are naturally shaped. A law of succession which was a mere inference from the rule would be widely approved and within the grasp of every man's intelligence. But the farther one departs from this principle, by allowing exceptions to the rule, the more difficult is the law to understand and to remember. The common law of England affords a striking illustration. Its canons as to the scheme of descent are so complex; it admits such nice distinctions; the precedents which serve to guide us are so full of quiddities, that not only is it impossible for simple good sense to anticipate or divine its provisions, it is even difficult to ascertain and grasp them. It has become a study profound as that of the most abstract science, and one open only to a small number of privileged mortals. Indeed, it has been found necessary to subdivide the subject, for no jurist pretends to understand the whole of it. Such is the fruit of a too superstitious regard for antiquity!

Laws of  
succession.

When new laws chance to come in conflict with a principle established by former legislation, the more firmly rooted the principle is, the more hateful does the inconsistency appear. There is a rude clashing of opinions, and disappointed expectation charges the legislature with an act of tyranny.

In Turkey, on the death of a man who holds office, the Sultan appropriates the whole of the dead man's fortune, while the children fall, at once, from the heights of opulence to the depths of poverty. This law, which defeats all natural expectations, is probably borrowed from certain other Eastern countries, where it is less odious and less incongruous, seeing that in those countries the sovereign confers office on none but eunuchs.



Laws  
should con-  
form with  
'utility.'

4. The fourth condition is that 'the laws shall be consistent with the principle of Utility'; for Utility is the point towards which all expectations tend to converge.

At the same time, a law consistent with utility may be found to be in conflict with public opinion. But this is only a casual and transient circumstance; and, in order to reconcile everybody to the law, it would simply be necessary to demonstrate its conformity with the great principle. So soon as the shrouding veil is raised, expectation will be satisfied and public opinion won over. Now, the more certain it is that the laws are, in point of fact, consistent with utility, the more readily will that congruity become manifest. If we ascribe to anything a quality which it does not possess, the triumph of error will last but for a day: a single glistening sunbeam will serve to dispel the illusion. But a quality which is really possessed, although its existence be unknown, may at any moment come to light and shine forth in all its glory. Any innovation is at first shrouded in a dense and impure atmosphere; for masses of cloud formed by caprice and prejudice hover around it. Its shape is distorted by the varying degrees of refraction undergone in this deceptive medium. It takes time for the eye to fasten upon the object, and disentangle it from its alien surroundings. But, by slow degrees, truth will win the day; for if the first attempts do not succeed, the second will prove more fortunate, when it is better known where lies the difficulty to be overcome. The project which really favours the greatest number of interests cannot fail in the end to gain the greatest number of votes; and the useful novelty, at first rejected in alarm, soon becomes so familiar that no one even remembers when or how it was introduced.

Laws  
should be  
simple and  
methodical.

5. The fifth condition is that 'there should be method in the laws.' In its effect upon expectation, the defective arrangement of a code of laws may give rise to the same inconvenience as incoherence or inconsistency. It may

produce the same difficulty in grasping the meaning of the code and charging the memory with its provisions. The measure of every man's understanding is limited; and the more complex a law is, the more surely is it above the comprehension of a large number of persons. Hence it is less well known, and has less hold upon men: it does not occur to their minds at opportune moments, or, what is worse, it may mislead them and give rise to false expectations. A code should be simple both in style and in arrangement: it should serve as a manual of instruction for every individual; and, when in doubt, a man ought to find guidance in its pages, without need of an interpreter.<sup>1</sup>

The more closely the laws conform with the principle of Utility, the simpler will be the code; for a system founded upon a single principle may be as simple in form as in substance. Indeed, it is only a system so founded that can be distinguished by natural arrangement and a familiar nomenclature.

6. Sixth condition: Moreover, to gain complete mastery over expectation, a law must present itself to the mind as one which is 'certain to be enforced'; at any rate, it should not afford any reason for presuming the contrary. If a man counts on escaping from the law without much difficulty, he at once forms an expectation in conflict with the law itself. It then becomes worthless, and only resumes its efficacy as an engine of punishment. And these fruitless punishments are an additional reproach to the law:

Laws  
should be  
certain to  
be en-  
forced.

<sup>1</sup> In an early MS., Bentham states one objection to the course, which is nowadays persistently pursued, of consolidating Acts and, at the same time, introducing new provisions: 'The great objection to consolidating new provisions into the old Acts is that then the whole becomes new, so that the party that opposes the new provisions spins out the time by debating the old provisions *de novo*—Per Lind [1737-1781; author of *Letters concerning the Present State of Poland*], from Robinson and Lord North. The remedy would be to make a standing resolution that it is the opinion of the House that only new provisions ought to be the subject of debate' (MSS. University College, No. 69; cited Halévy, i. 323). The danger, at present, arises rather from the absence of any opportunity of debating even the new provisions. (C. M.<sup>W</sup>A.)

despicable from its impotence, odious from its penal consequences, it is always bad, whether the guilty suffer or whether they go scot-free.

This principle has often been set at naught in flagrant fashion. For example, when, at the time of Law's banking scheme,<sup>1</sup> the citizens were forbidden to keep in their houses more than a certain sum in cash, was not everyone entitled to presume that he would succeed in evading the prohibition? How many prohibitions in mercantile law are defective in this regard! A multitude of such regulations, easy to escape, constitutes, so to speak, an immoral lottery in which individuals stake their money against the legislator.

This principle furnishes a good reason for placing domestic authority in the hands of the husband. If it had been given to the wife, the physical power being on one side, and legal control on the other, there would have been everlasting discord. Had a nominal equality been established, it could never have been maintained; for, when two wills are in opposition, one or other must prevail. The subsisting arrangement is, therefore, most conducive to family concord; because, when physical power and legal control work in harmony, we have the best security for effective action.

The same principle will be found very useful in the solution of certain problems which have embarrassed jurists, such as this: In what cases ought a 'thing found' to be treated as the property of the finder? The easier it would be to appropriate the thing whatever might be the state of the law, the more expedient is it to avoid making any such law as will disappoint expectation; or, in other words, the easier it would be to evade the law, the more unwise

<sup>1</sup> John Law (1671-1729), a Scotch adventurer, who, in 1717, formed the Mississippi Company, to which the Regent of France (Orleans) granted Louisiana and the tobacco monopoly. Law was appointed Controller-General of Finance, but in 1720 his vast issue of notes led to his exile. He died at Venice in 1729. (C. M. A.)

Applica-  
tion of the  
sixth condi-  
tion to the  
married  
state.

Application  
of the sixth  
condition  
to the laws  
affecting  
the finding  
of property



is it to make a law which, appearing to the mind almost impossible of execution, could hardly fail to work harshly if, by chance, it were put into operation. We may make this clearer by an example. Suppose I find a diamond whilst I am tilling the earth. I shall feel prompted to say to myself, This is mine: and, at the same moment, an expectation of keeping it will naturally arise, not merely from the bent of my desires, but also from analogy with the customary ideas of property. (1) I have physical possession of the gem, and that alone supplies a title where there is none other to countervail it. (2) There is something suggestive of myself in the very discovery: it was I who drew this diamond from the dust, where it lay of no account, unknown to all the world. (3) I may flatter myself with the notion of keeping it without the sanction of the law, or, even, in spite of the law; for all I have to do is to hide it, until I can find a pretext for making people believe that I acquired it by some other title. Hence, should the law resolve to bestow it on some person other than myself, as the law could not check my first prompting, my hope of retaining the gem, it would, by taking it from me, cause me to feel the pain of disappointed expectation, which is commonly described as 'injustice' or 'tyranny.' And this alone would afford a sufficient reason for awarding the article to its finder, unless some stronger reason to the contrary were forthcoming.

The finding  
of property  
—*confd.*

The rule will, therefore, be subject to variation, according to the probability, in any particular case, of my being able to keep the article without the sanction of the law for so doing. A wrecked vessel which I have been the first to espy upon the shore, some mine or island which I have discovered, are objects as to which a law already established would preclude any idea of property; because it is not possible for me to appropriate them, clandestinely, to my own use. The law, which denied them to me, being easy of execution, would have its full and entire effect upon



my mind; so that a legislator, consulting this principle only, would be free either to grant such an object to the man who made the discovery, or to withhold it from him. But there is a special reason for showing some sort of favour to the man, inasmuch as a reward given to diligence tends to increase the general wealth. If all the profit of a discovery falls to the public treasury, that all is apt to be very small.

Seventh condition: 'The laws should be construed literally.'

7. The seventh and last condition for the control of expectation is that 'the laws should be construed literally.' This condition depends partly on the laws themselves, and partly on the judges. If the laws are no longer in harmony with the enlightened understanding of the people, if the laws of a barbarous age remain unchanged in an era of civilization, the tribunals gradually forsake ancient doctrines, and, insensibly, substitute novel maxims. Thence will result a sort of conflict between laws that are growing obsolete and usages that are taking their place; and, by reason of the consequent uncertainty, the control of the laws over expectation will become weaker.

Use and abuse of 'interpretation.'

The word 'interpret,' in the mouth of a lawyer, has had a meaning widely different from that which it has borne when used by another person. To interpret a passage in an author is to bring out quite clearly the precise idea that he had in his mind; but to interpret a law, in the sense of the Roman jurists, is to repudiate its plainly-expressed intention in order to substitute some other, on the assumption that this substitute conveys the real intention of the legislator.

In such a proceeding there can be no security.<sup>1</sup> Although a law be hard to understand, vague, and incoherent, a citizen has always some chance of grasping it. The note of warning sounded is not loud or clear; the law is, of course, less efficacious than it might be, but it is never

<sup>1</sup> '[The judges] not only may but must develop the law in every direction except that of contradicting rules which authority has once fixed.' See Sir F. Pollock's admirable note ('D') in his edition of Maine's *Ancient Law* (1906), chap. ii., at p. 46. (C. M. A.)

useless: and, at any rate, we know the extent of any harm it can do. But when the judge presumes to arrogate to himself authority to 'interpret' the laws—that is to say, to substitute his will for that of the legislator—then everything becomes arbitrary and uncertain; no one can forecast the line that his caprice will take.<sup>1</sup> And it is not enough to treat this mischief as standing by itself; howsoever great it may be, it is a small matter in comparison with the magnitude of possible consequences. The serpent, it is said, can urge his body through any aperture, into which he has managed to slip his head. In the matter of legal oppression, it is just this insinuating head of which we must beware, lest presently we see unfolding, in its train, all the tortuous folds of tyranny. When springing from this source, it is not only the evil, but even the good, at which we should look askance. Any usurpation of an authority over and above the law, although useful in its immediate effects, must, when we look to the future, be viewed with deep concern. There are bounds, and, indeed, narrow bounds, to any good that can result; but to alarm and possible evil there is no limit. Danger, in vague form, hovers over every head.

Without speaking of caprice or ignorance, what opportunities are afforded for partiality! The judge, now adhering to the letter of the law and now putting his gloss upon it, may always place whom he pleases in the right or in the wrong. He has no difficulty in shielding himself—either under the letter or under the gloss. He is a magician who astounds the beholders by pouring sweet and bitter from the same cup.

One of the most striking characteristics of English tribunals has been their scrupulous adherence to the

<sup>1</sup> Austin was of opinion that, instead of blaming judges for legislating, Bentham should have blamed them 'for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases' (edition of 1911, vol. i., p. 219). (C. M. A.)

declared will of the legislator, coupled with the closest possible compliance with precedents in that still imperfect branch of legislation which depends on custom.<sup>1</sup> This rigid observance of the laws may have inconveniences in an incomplete system; but it is a genuine spirit of liberty which inspires the English with so much horror of what is called *ex post facto* legislation.

Intercon-  
nection of  
the condi-  
tions.

All the conditions which predicate the excellence of laws are so closely interwoven that the fulfilment of any one of them involves the fulfilment of the others. Intrinsic utility — apparent utility — consistency — simplicity — cognoscibility — probability of enforcement: any two of these may be reciprocally considered as the cause or effect of each other.

Some char-  
acteristics  
of a code.

If the vague system known as 'custom' were got rid of, and the whole code put in written form; if laws which concern the whole community were comprised in a single volume, and those which affect particular classes were consigned to compact and separate compilations; if the common code were generally circulated, and became, as with the Hebrews, a factor in religious worship and a manual of education; if an acquaintance with it was essential to the enjoyment of political rights: then indeed would the law be truly known, every departure from it would be felt, and every citizen would constitute himself its guardian. It would no longer be wrapt in mystery; its exegesis would cease to be a monopoly; neither fraud nor chicane could evade it.

It is further necessary that the laws should be as simple in style as in arrangement; that they should be expressed in the language ordinarily used; and that legal forms should be free from scientific jargon. If the style of the code be

<sup>1</sup> Austin says that 'a great mistake is often made with respect to Bentham's notions of law. . . . He has again and again declared in his works that the reports of the decisions of the English courts are an invaluable mine of experience for the legislator' (*Jurisprudence*, edition of 1911, vol. ii., p. 679). (C. M. A.)

distinguishable from that of other books, it should be by its greater lucidity, its greater precision, its greater homeliness of diction; for it is designed to suit the comprehension of all men, and in particular of the class which is least enlightened.<sup>1</sup>

If, after conceiving such a legal system, we come to contrast it with the state of things that actually exists, the result is by no means favourable to our institutions. But, although the laws be defective, we should mistrust captious declamation and exaggerated complaint. The man, who is so narrow in his views or so impulsive in the matter of reform that he would subvert or deride a general system of law, is not worthy to be heard at the bar of an enlightened public. Who can set forth its benefits—I do not say under the best government, but under the very worst? Do we not owe to it all we possess of security, property, industry, and abundance? Do we not owe to it preservation of the peace, the sanctity of marriage, and the refining influence of family ties? The good which the laws produce is ever with us, every day and every hour; while the evil is but casual and fleeting. But the good is enjoyed unperceived, without being referred to its source, as if it came in the ordinary course of nature; while the evil is acutely felt, and, in describing it, suffering, spread over vast space and a long course of years, is focussed by the imagination on a single point. What abundant reasons for mistrusting exaggerated complaint!

I have not disposed of this important topic, and I intend to treat elsewhere of the caution necessary to be observed in legal innovation. So far from favouring the seditious exaltation which seeks to destroy under the pretext of reform, this book is designed to serve as an antidote to such anarchical doctrines, and to show that a fabric of laws,

Reformers  
should  
proceed  
warily.

<sup>1</sup> Austin complains of the mischief done to the cause of codification by overstating the degree of simplicity which can be given to the law (*Jurisprudence*, edition of 1911, vol. ii., p. 654). (C. M. A.)



easy to pull to pieces but difficult to repair, ought not to be handed over for alterations to a gang of rash and ignorant workmen.<sup>1</sup>

<sup>1</sup> The most hostile critic of Bentham's work must acknowledge the debt the world owes him for the impulse he gave to the provision of Codes. 'Had Bentham done nothing more,' wrote Professor Montague, in his edition of the *Fragment on Government*, 'than point out the way in which the law of England could best be applied to the needs of India, he would have rendered a distinguished service to his country and to mankind.' (C. M. A.)

# PRINCIPLES OF THE CIVIL CODE.

## PART II.

### THE DISTRIBUTION OF PROPERTY.

#### CHAPTER XVIII.

##### OF TITLES WHICH CONFER A RIGHT OF PROPERTY.<sup>1</sup>

HITHERTO we have endeavoured to unfold the reasons which should lead a legislator to sanction the right of property. But so far we have considered wealth only in the aggregate: we must now descend to details, analyze its constituent elements, and seek to discover the principles which should govern the distribution of property, at the time when estates or personal chattels present themselves to the law for appropriation by assigned individuals. These principles are identical with those already formulated: 'Subsistence,' 'Abundance,' 'Equality,' 'Security.' When they are found to harmonize, we have no difficulty in coming to a decision; but when they part company, we must needs discriminate and award the preference.

I. *Actual Possession*.—Present actual possession is a title to property which may precede and take the place of every other title. It will always hold good against any man who has none other to set in opposition to it. To take away, arbitrarily, from him who has in order to give

<sup>1</sup> For a more precise classification, see *General View of the Body of the Law* (Bowring, vol. iii., pp. 186 *et seq.*; taken from Dumont's *Vue Générale d'un Corps Complet de Législation*, contained in the *Traité de Législation*, vol. i., pp. 146-370). 'An interest in a thing is the right of making an use of it. Interest is a more general word than Title. Title applies rather to the whole of a thing, and to all its uses. Interest applies indifferently to the whole of a thing, or any part or parts of it, to the sum of its uses or any one or more of its uses' (MSS. University College, No. 69; cited Halévy, vol. i., p. 308). (C. M. A.)

to him who has not would, no doubt, be to create a loss upon one side and a gain upon the other. But the amount of resulting pleasure would fall short of the amount of resulting pain; and, moreover, a violent act of this sort, by its attack upon security, always spreads alarm—amongst owners as a class. So we see that present actual possession is a title founded on good of the first order, and also on good of the second order (*cf. ante*, p. 70).

Title of  
'first occu-  
pant.'

What is called the right of 'the first occupant' (or of 'original discovery') really comes to the same thing. When a right of property is awarded to the first occupant, we note that—(1) He is spared the pain of disappointment, a pain he would have felt on finding himself deprived of something of which he was the first to take possession. (2) The award checks contention, by obviating the possibility of strife between the first occupant and a succession of rival claimants. (3) It conduces to pleasure which, otherwise, would not have existed at all; for a first occupant, who had reason to apprehend the loss of his treasure, would never dare to betray himself by open enjoyment of it, so that anything he could not manage to consume forthwith would prove valueless to him. (4) The advantage thus assured to him, being in the nature of a reward, acts as a spur to the diligence of others, who will be encouraged to seek like benefits for themselves; and it is these particular acquisitions that go to form the general aggregate of wealth. (5) If unappropriated things did not always belong to the first occupant, they would become the prey of the strongest; while the weak would be subject to ceaseless acts of oppression.<sup>1</sup>

Such reasons as these do not present themselves to men's minds in a distinct shape; but they are seen darkly and confusedly, being grasped, as it were, by instinct. Accordingly, people say that this right is ordained by

<sup>1</sup> *Cf. Maine's Ancient Law*, chap. viii. (Sir F. Pollock's edition of 1906, pp. 258 *et seq.*), and Blackstone's *Commentaries*, book ii., chap. xvi. (C. M. A.)

'justice,' 'equity,' or 'reason'—words, repeated by everybody and explained by nobody, which express nothing more than a feeling of approbation. But this approbation, resting as it does on solid grounds, cannot fail to gain fresh force from the support of the Principle of Utility.

The title of original occupation was the primitive foundation of property in land. It will still be applicable in the case of islands newly formed, or of freshly-discovered territory; save only as to the right of government, which is a peculiar appurtenance of the Crown or State.

2. *Ancient Bona-Fide Possession.*—This second title is commonly called 'Prescription': the reasons on which it is founded are the prevention of disappointment and the security of owners in general.

Title by  
virtue of  
Ancient  
Possession.

After a certain length of time prescribed by law, possession ought to prevail over every other title. If you allow the prescribed period to elapse without putting in any claim, it is a proof that you either knew nothing of your rights or had no mind to take advantage of them. In either case, there was on your side no expectation of enjoyment, no desire to obtain possession of the thing; while on my side there is both such expectation and a desire to keep what I have got. To leave me in possession is no blow at security; but to transfer the possession to you constitutes an attack on security, and disquiets every other holder of property who knows no title save his long possession in good faith.

But what length of time is necessary to transfer 'expectation'—that is to say, hope of enjoyment—from the original owner to the man who is in process of acquiring a title by possession; or, in other words, what time should be necessary to confer a legal right to property in the hands of a mere possessor, and to extinguish all conflicting titles? We cannot give any precise answer to this query: the dividing line must be drawn more or less haphazard, but with due regard to the nature and value of the particular class of property. Though the line of demarcation



be not so drawn as to preclude 'disappointment' on the part of *every* person interested, it will, at least, prevent all mischief of the second order. The law gives me fair warning that, if for a year, ten years, or thirty years, as the case may be, I neglect to assert my right, the loss of that right will be a result of my negligence; and there is nothing in this threat of a consequential loss, which it is in my power to avert, that should disturb my sense of security.

I have supposed the possession to be retained honestly and in good faith; otherwise its confirmation would be rewarding crime, not upholding the principle of security. Not even the age of a Nestor should suffice to secure a usurper in the wages and spoil of his lawless seizure. Why should there ever come a time when the wrongdoer shall be at rest; why should he enjoy the fruits of his crime under the protection of the very laws which he has violated?

As to those persons who take from him by inheritance, a distinction may be drawn. Can they, in the special circumstances of the particular case, be regarded as possessors in good faith? If so, the same arguments may be urged on their behalf as on behalf of the original proprietor; and, in addition, they have actual possession to incline the balance in their favour. But, if both they and the predecessor through whom they take are tainted with bad faith, they are no better than accomplices; and impunity should never become the privilege of fraud.

3. *Possession of the Contents and Produce of Land.*—The right of property in a close of land comprises all that the land 'contains,' together with all that it can 'produce.' What can its value be, if not its 'contents' plus its 'products'? By 'contents' we mean all that lies beneath the surface, such as mines and quarries; while 'products' imports everything that belongs to the vegetable kingdom. All conceivable arguments conspire to stretch to this extent the right of property in land—security, subsistence, increase of aggregate wealth, the benefit of peace.

No title based on Possession obtained by fraud.

Position of inheritors.

Right of property in Land extends to its Contents and Produce;

4. *Possession of what the Land sustains, and of what is cast upon it.*—If animals have been reared on my land, it is to me that they owe their birth and their sustenance. Their existence would be a source of loss to me, if the possession of them did not assure me some compensation. If the law awarded them to anyone but me, it would be all gain on his side and all loss on mine—an arrangement in conflict alike with ‘equality’ and with ‘security.’ It would then become my interest to reduce the number of animals and to prevent their multiplication, to the detriment of the general wealth.

And to  
Animals  
sustained  
thereby,  
and Chat-  
tels cast  
thereon.

If chance casts upon the land things which have not yet received the stamp of property, or things which have lost its impress, such as a whale driven ashore by the storm, the scattered fragments of shipwreck, or uprooted trees, these things ought to belong to the possessor of the land. The grounds for this preference are, first, that he is in a position to put them to profitable use without loss to any person whatsoever; secondly, that they cannot be denied him without causing in him a pain of disappointment; and, lastly, that no other person could take possession of them without entering his land and so encroaching upon his rights. Indeed, there can be urged in his favour all the arguments which support the claims of a first occupant.

5. *Possession of Neighbouring Lands.*—Suppose that water which covered unappropriated land has just left it; to whom should the ownership of the new territory be allotted? There are several reasons for conferring it on the owners of adjoining lands; for (a) they alone could enter into occupation without encroaching upon the proprietary rights of other people; (β) they alone can have formed any possible expectation in connection with this territory, or conceived any sort of claim upon it; (γ) the chance of gaining by the retreat of the waters is, after all, only a set-off against the chance of losing by their invasion; and (δ) the ownership of land, captured from the waters, will

Title conferred  
through  
Possession  
of adjoining  
Lands.

act as a reward, tending to incite men to execute the various works and to perform the labours needed to acquire and secure such extensions of territory.<sup>1</sup>

Title by  
Labour ex-  
pended on  
one's own  
Land or  
Chattels.

6. *The Betterment of One's Own Property.*—If I apply my labour to something which is already accounted as my property, my title thereto acquires fresh force. Take the vegetables my land produces: I have sown and culled them. These cattle I have tended; these roots I have dug up from the ground; these trees I have felled and fashioned at my will. If I should have suffered on finding these things taken from me in their rough state, how much more should I suffer when the efforts of my industry, imparting a new value to every object, have deepened my attachment to them and enhanced my expectation of keeping them for myself? This fund of future enjoyments, constantly augmented by labour, could have no existence without 'security.'

Title by  
Labour ex-  
pended on  
the Prop-  
erty of  
another.

7. *The Betterment in Good Faith of Property in One's Own Possession, but belonging to Another.*—Now, suppose that I apply my labour to something of which another man is the owner, treating it as though it belonged to myself; for example, if I have made cloth with your wool, to which of us two will the finished article belong? Before resolving this problem, we must clear up certain questions of fact: Was it in good faith, or in bad faith, that I treated the wool as belonging to myself? If in bad faith, to leave me

'Accession.'

<sup>1</sup> So much for the theory. Its practical application would involve the settlement of many intricate questions; otherwise such a concession might be like the partition of the New World made by one of the Popes between the Spaniards and the Portuguese. Suppose that the waters have just quitted a bay, with a number of proprietors on its shores. Should the distribution be adjusted with reference to the quantity of land owned by each proprietor, or to the distance that his holding stretches along the shore? There must be drawn lines of demarcation, indicating various modes of treatment. But we should not defer the tracing of such lines until the event has happened and the value of the derelict lands is known; for then everybody will entertain hopes which can only be realized by a few. Anticipate the event: for then 'expectation,' not yet being formed, may be made to follow the lines appointed by the legislator (Dumont).



in possession of the cloth would be conferring reward on crime. But, if I acted in good faith, it remains to inquire which of two values was the greater—the value of the wool or the value of the labour I bestowed upon it. How long is it since the original owner lost the wool? How long has it been in my possession? Who was the owner of the premises where the cloth was stored, at the moment when the claim was raised? Did they belong to me, or to the original owner of the wool, or to some third person?

The principle of Caprice, paying no heed to the comparative assessment of pleasures and pains, would give everything to one party, without any concern for the interests of the other.<sup>1</sup> But the principle of Utility, anxious to confine within the narrowest compass an inevitable inconvenience, carefully considers the two sets of conflicting interests, casts about for some mode of reconciliation, and prescribes indemnities. It will, therefore, award the finished article to the claimant, who would prove to be the greater loser if his claim were disallowed; but this must be subject to the burden of his providing for the payment of adequate compensation to the rival claimant.

We must be guided by these same principles in resolving the difficulty that arises when one article chances to get mingled and confounded with another; as when your metal is fused in the same crucible with mine, or when my liquor is poured into the same vessel as yours. The Roman jurists engaged in long disputations to determine which of us twain should have the whole: some, under the name of ‘Sabinians,’<sup>2</sup> wished to give the whole to me; others,

‘Confusion’ of goods.

<sup>1</sup> According to Blackstone (book ii., chap. xxvi., sect. 6), both by Roman and by English law, the original owner is entitled, by his right of possession, to the property in its improved state; unless, indeed, the thing itself be changed into a different species (as by making wine out of another’s grapes), in which case it belongs to the new operator, subject to his making satisfaction to the former proprietor for the materials used. (C. M. A.)

<sup>2</sup> Sabinus (Massurius) was a Roman jurist who flourished in the reign of Tiberius. From him the school of the Sabiniani took its name. (C. M. A.)



under the name of 'Proculeians,'<sup>1</sup> were for giving the whole to you. Which faction was in the right? Neither of them. Their decision would always leave one of the parties a sufferer. A very simple question would have put an end to all these disputations: Which of the two, by losing what had been his, would lose the more? English lawyers have cut the Gordian knot. They have not been at the trouble of inquiring where the greater injury lay; they have taken no account of good faith or bad faith; they have paid no heed to the greater actual value, or to the greater expectation of enjoyment. They have decided that movable effects shall always be awarded to the possessor for the time being, subject only to the burden of his providing indemnification for the rival claimant.<sup>2</sup>

Title by  
winning  
mines and  
minerals.

8. *Exploration of Mines in Another Man's Land.*—We will suppose that in the depths of your land there lie treasures, which you will not attempt to win, either because you lack the skill or the means necessary to prosecute the search, or because you have little confidence in the success of such a venture; and the treasures, accordingly, remain buried. Now, if I, a stranger to your estate, have both the skill and the means necessary for the enterprise, and ask to be allowed to undertake it, ought I to be granted a right to do so, without your consent? Why not? If left in your hands, all this wealth, lying underground, will do nobody any good; in mine it would acquire great value, and, once brought into circulation, would serve to stimulate industry and trade. What wrong is done to you? You lose nothing at all; the surface, from which alone you derive

<sup>1</sup> Proculus gave his name to the school of Proculiani or Proculeiani. He was a jurist and a contemporary of Nerva the younger. (C. M. A.)

<sup>2</sup> According to Blackstone (book ii., chap. xxvi., sect. 7), if the intermixture be by consent, the proprietors have an interest in common, in proportion to their respective shares. But in case of wilful intermixture by one man without the knowledge of the other, although both the Roman Law and English Law give the entire property to him whose original dominion is invaded, the Roman Law allows satisfaction for the loss of the other man, while the English Law, to guard against fraud, requires no such satisfaction to be made. (C. M. A.)

any advantage, remains always in the same condition. But what the law, with due regard to the interests of everybody concerned, ought to do for you, is to allocate to you a portion of the accruing profits, more or less great according to circumstances. For, although the treasure was not a source of actual gain to you, yet it afforded you some expectation of deriving a profit some day, and the law ought not to deprive you of your chances, without making proper compensation. Such, indeed, is the law of England. Under certain conditions, it permits any man, who is ready to engage in the enterprise, to follow up a vein of mineral discovered in the field of another person.<sup>1</sup>

9. *Liberty of Fishing in Great Waters.*—Great lakes, great rivers, great bays, and in particular the ocean, are not occupied by exclusive proprietors. They are regarded as belonging to nobody; or, to speak more accurately, as belonging to everybody. There is no ground for limiting the right of fishing in the ocean. Of most kinds of fish, the supply in great waters seems inexhaustible. The liberality, nay, the profusion, of nature in this regard transcends anything that we can conceive. The indefatigable Lewvenhoek<sup>2</sup> has estimated the eggs of a single codfish as exceeding in number ten millions. What we can take and consume from this immense storehouse of food is as naught, when compared with the destruction wrought by physical causes, which we know not how to obviate or even to reduce. Man in the open sea, with his fishing smack and nets, is a very feeble rival of the great tyrants of the ocean; he makes no

Title acquired by Fishing.

<sup>1</sup> Dumont, apparently, did not fully appreciate Bentham's MSS. on this point. The common law of England does not permit such an enterprise; but there are *customary* rights of this kind in certain districts, and in some cases they have been declared and delimited in local Acts. Cf., e.g., Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 and 16 Vict., c. clxiii.). (C. M. A.)

<sup>2</sup> Leeuwenboeck (or Lewvenhoek), Anton Van, was born at Delft in 1632, and died there in 1723. He did excellent work with the microscope, and was an ardent opponent of the doctrine of spontaneous generation. His works were published in four volumes at Leyden, 1719-1722, and an English translation of certain selected portions appeared 1798-1801 (by S. Hook). (C. M. A.)

more havoc among the smaller kinds than do the whales. As to fish found in rivers, lakes, and small inlets, the laws should take such precautions as are necessary and efficacious. Where there is no occasion for rivalry, no fear of finding a sensible diminution in the stock of wealth by reason of the number of competitors, we should allow to everyone the rights of a first occupant, and encourage every form of toil which tends to add to the general abundance.

Title ac-  
quired by  
Hunting.

10. *Liberty of Hunting over Unappropriated Lands.*—The same observations apply to tracts of land which are not appropriated, to uncultivated wastes, and to wild forests. In vast territories which are not peopled in proportion to their extent, there may be found large areas of such land; and over these regions the right of hunting may well be exercised without stint. For there man's only rivals are the beasts of prey; while the chase serves to enlarge the stores available for subsistence, without injuring anybody. But among civilized communities, where agriculture has made marked advances, and the areas still unappropriated bear but a very small proportion to those which have already been impressed with the seal of ownership, there are many grounds that may be urged against granting a right of chase, analogous to that accorded to the first occupier of vacant land.

Inconveni-  
ences of un-  
restricted  
Hunting  
Rights in  
populous  
Regions.  
Destruction  
of Species.

*First Inconvenience.*—In a thickly-populated country, the slaughter of wild animals may easily proceed at a greater rate than their reproduction. Once let the right of hunting be free to all; and then the species of animals, which are objects of the chase, will probably diminish in number in a very appreciable degree, or even disappear altogether. The sportsman would soon have as much difficulty in procuring a single partridge as he finds to-day in bagging a hundred, and would, accordingly, demand a price increased by one-hundredfold. He would suffer no loss himself; but he would give the public, for their money, only a hundredth part of the value he gives them to-day.



To put the matter more plainly, the fund of pleasure, resulting from the consumption of partridges, would be reduced to a hundredth part of what it is at present.

*Second Inconvenience.*—The chase, without being more productive than other forms of toil, unfortunately presents more attractions. In prosecuting the chase, sport is combined with difficulties, idleness with activity, and a sort of celebrity with risk. The charm of a calling, so well contrived to suit all the inborn tastes of mankind, will draw to this career a vast number of competitors. Their rivalry will soon reduce the reward of such employment, until it affords a bare subsistence; so that adventurers of this class will, as a rule, be found to be poor.

Encouragement of unproductive Labour.

*Third Inconvenience.*—As the chase is restricted to particular seasons, there will be considerable intervals of time during which the hunter will find no opportunity of employment. Yet he will not readily return from a wandering to a sedentary life—from independence to a state of subjection—from habits of idleness to habits of toil. Accustomed, like the gamester, to feed upon chance and high expectations, a small fixed wage presents few attractions to him. Now, when a man is in such a condition, poverty and sloth may well lead him into crime.

Long Intervals of Idleness.

*Fourth Inconvenience.*—The exercise of this pursuit is, in the nature of things, productive of offences. The angry disputes it begets, the lawsuits, the prosecutions, the convictions, the consequent imprisonments and other penalties, are more than enough to countervail its pleasures. The sportsman, weary of waiting in vain on the highways, stealthily spies out the game in the neighbouring enclosures.<sup>1</sup> If he believes himself to be under observation, he turns aside and lies hidden, for he is an adept in the arts

Encouragement of Disputes and criminal Prosecutions.

<sup>1</sup> It must be remembered that, when Bentham wrote, there was no legitimate traffic in game, nor could any 'licence' or 'certificate' be obtained authorizing its slaughter. The right to kill was vested solely in certain 'privileged' persons, while the sale of game was altogether prohibited. Needless to say, such laws were openly and systematically violated. (C. M. A.)



of patience and cunning. If he thinks the watchers are gone, he no longer respects the boundary walls, but clears the ditches, leaps the fences, and plunders the preserves. Ofttimes, cupidity getting the better of prudence, he will be drawn into dangerous situations from which it is impossible to escape without crime or disaster. If hunting upon the highroads were permitted, an army of guards would be needed to restrain the excursions of the hunters.

Necessity  
for Multi-  
plication of  
Laws.

*Fifth Inconvenience.*—If we decided to preserve this right of chase, which, exercised as it is within such narrow limits, is of such small advantage to anybody, we should require a variety of laws, both in the civil and in the penal code, to prescribe the character of its enjoyment and to provide punishments in case of its abuse. Now, this multiplicity of laws is always an evil, for laws cannot be multiplied without being rendered less efficacious. And, moreover, the severity necessary to deter from crimes so attractive and so easy to commit attaches odium to the ownership of estates, and brings the rich man into constant strife with his poorer neighbours. The way to get rid of the inconvenience is not to regulate the right, but to suppress it.

Rights of  
Chase  
should be  
suppressed.

When once the prohibitory law becomes well known, no hope or expectation of enjoying a privilege of chase will be aroused. People will covet partridges no more than barn-door fowls; and, even in the mind of the multitude, poaching will no longer be distinguishable from theft.

It is true that, nowadays, popular opinion favours this right of chase; but, if we must needs give way to popular opinion, it is only when the tide runs very strong and there is no hope of stemming it. Were pains taken to enlighten the people; to explain the motives of a prohibitory law; to get them to look upon it as a source of peace and security; to show them that the exercise of the existing right is gradually dwindling away, while the poacher's life is wretched and his ungrateful calling exposes him incessantly

to accusations of crime, and his family to shame and destitution; I venture to assert that popular opinion, under the gentle but constant pressure of reason, would very soon take a new direction.

There are some animals whose value after death is not enough to compensate for the damage they occasion when alive. Such, for example, are foxes, wolves, bears, and all beasts of prey which pursue and destroy the various species tamed by man. So far from preserving such creatures, our only concern should be to get rid of them. One way of doing this would be to grant the property in them to the hunter, as to a 'first occupant,' without any regard to territorial considerations. Every sportsman who attacks such harmful animals should be looked upon as if he were employed by the police. But we must not admit this exception save in the case of animals capable of much mischief.<sup>1</sup>

Pursuit of  
Vermin  
and Beasts  
of Prey.

<sup>1</sup> See chap. xv. of the *Vue Générale* in vol. i. of the *Traité de Législation*, p. 284 (Bowring iii., p. 190). The conditions of the chase prevailing in Bentham's days may be illustrated by an extract from a circular issued by the Duke of Devonshire, in 1797, as to fourteen of his manors: 'His Grace the Duke of Devonshire, from his munificent Disposition, has resolved to devote certain Moors for Grouse Shooting, to Gentlemen resident in the neighbourhood thereof, on applying to Mr. S. of S. for tickets, and using them with Discretion. . . . His Grace thinks this mode the most likely to afford pleasure to his Friends, and hopes they'll consider it right in him to Discharge such as refuse to ask permission, *however qualified*. Poachers and Dog Breakers will be prosecuted, of which they have this Notice.' 'The present system of the Game Laws,' wrote Sir Samuel Romilly on May 18, 1818, 'is a most pernicious one, and is productive of great misery and of enormous crimes.' (C. M. A.)

## CHAPTER XIX.

### ANOTHER MODE OF ACQUISITION : TITLE BY CONSENT.

Every  
Alienation  
imports  
Advantage.

It is possible that, after coming into possession of something by a lawful title, we may wish to part with it and cede the enjoyment of it to another. Will such an arrangement be ratified by law ? Without doubt, it ought to be. All the arguments which might have been urged on behalf of the transferor have now changed sides, and may be urged on behalf of the transferee. Besides, the original proprietor must have had some motive for wishing to give up his property. When we speak of a ' motive,' we intend some ' pleasure,' or something equivalent to a pleasure: the pleasure of ' friendship ' or ' goodwill,' if the thing be given up for nothing; the pleasure of ' acquisition,' if it be treated as an object of barter; the boon of ' security,' if it be ceded as a safeguard against some mischief; the pleasure of ' reputation,' if the disposition be designed to acquire the esteem of one's fellow-creatures. We thus see that the aggregate enjoyment of the two parties interested will, assuredly, be augmented by the transaction. The transferee now stands in the shoes of the transferor, so far as relates to the advantages enjoyed before the transfer, while the transferor secures a new and additional advantage. We may, then, lay down as a general maxim that ' every alienation imports advantage.' A benefit of some kind always results from it.

Nature of  
an Ex-  
change.

If it is a question of ' exchange,' it will be observed that there are two alienations, each of which has its separate advantages. The advantage to either of the contracting parties

consists in the difference between the value to him of the article he acquires and the value which he places upon the article that he gives up. In every transaction of this kind there are brought into being two new masses or portions of enjoyment; and herein lies the true benefit of commerce. We may add that, in every craft, there are many things which can only be produced by the co-operation of a large number of workmen; and, in all such cases, the labour of a single workman would be of no value to himself or to others if he could not exchange it.

2. *Reasons for invalidating Exchanges.*—There are, however, some cases in which the law ought not to give its sanction to an exchange, or in which the interests of the parties ought to be adjusted as if the bargain had not been struck. This is so where, instead of being advantageous, the exchange would prove injurious either to one of the parties or to the general public. The various reasons for invalidating exchanges may be ranged under the eight heads following: (a) Unfair concealment; (β) Fraud; (γ) Undue coercion; (δ) Subornation to the commission of crime; (ε) Erroneous belief in the existence of legal obligation; (ζ) Erroneous belief as to value; (η) Legal prohibition: infancy; madness; (θ) Things likely to become hurtful by the exchange.

Grounds on which exchanges may properly be set aside.

(a) *Unfair Concealment.*—If the object acquired proves of less value than its new proprietor had supposed when he made the bargain, he naturally experiences regret, and feels the pain of disappointment. If this value is below that which he has given in exchange, instead of making a gain he has made a loss. It is true that the other party has secured an advantage; but the ‘good of gain’ is not equivalent to the ‘evil of loss.’ I have, we will suppose, paid ten pounds for a horse which, if sound, would be worth that sum; but, seeing that he is broken-winded, he is only worth two pounds. This results in a gain of eight pounds to the seller, and the loss of a like amount to me; but if

Unfair Concealment. *Caveat emptor.*



the interests of the seller and myself are balanced and compared, it will be found that the bargain is not, on the whole, a beneficial one. If, however, this depreciation in value was not known to the original owner when the bargain was struck, why should the bargain be avoided? Why should the original owner be compelled to make a re-exchange of a disadvantageous character? The loss must fall upon someone, but why upon him rather than upon the other party? Suppose, even, that this cause of depreciation was within his knowledge, was it his duty to disclose it voluntarily, or would he be justified in leaving it to the purchaser to make inquiry?

There are, it would seem, two questions that always arise when considering whether a bargain should be avoided on the ground of 'unfair concealment.' Was the existence of the defect within the knowledge of the vendor? If so, was it one of the cases in which a vendor should be compelled to make voluntary disclosure? The solution of these questions involves too much detailed investigation to find a place here, especially as it is impossible to propound a general solution applicable in all cases, various modifications being necessary according to the varying types of subject-matter.

Fraud.

(β) *Fraud*.—This case is simpler than the one preceding. Fraudulent acquisition must never be permitted, when it can be prevented; it is in the nature of an offence, bordering on theft. We will suppose that you had asked the vendor whether his horse was broken-winded, and that he had answered in the negative, well knowing the animal to be suffering from that defect. To give legal sanction to such a bargain would be to reward crime. Add to this the reason mentioned in the preceding case—namely, that the evil accruing to the purchaser is greater than the advantage accruing to the vendor—and you will plainly see that this cause of avoidance is well founded.

Undue  
Coercion.  
Duress.

(γ) Similar observations apply to *Undue Coercion*. Suppose that a vendor, whose horse is worth only two pounds,

constrains you, by violence or threats, to purchase it for ten. Assuming that you would have been willing to give two pounds for it, the excess is so much money obtained by crime. No doubt even this loss may be advantageous to you in comparison with the mischief with which you were threatened in case of refusal to acquiesce in the vendor's demands; but neither such a comparative advantage, nor the positive gain of the delinquent, can possibly counterbalance the evil of the crime.

(δ) So, too, with *Subornation*. By this term I intend the payment of a price for some service which involves the commission of crime, as where money is offered to a man to seduce him into giving false testimony. There are two advantages gained by such a bargain—that of the suborned, and that of the suborner—but these same advantages are in no wise on an equal footing with the evil of the offence. I may remark, in passing, that, in case of fraud, undue coercion, or subornation, the law is not content merely to annul the bargain; it seeks to countervail such action in more drastic fashion by means of positive punishments.

(ε) *Erroneous Belief in the Existence of Legal Obligation*.—We will suppose that you have caused your horse to be handed over to a man in the mistaken belief that your steward had sold the horse to him, or under the erroneous impression that the man was authorized by Government to insist on delivery of the horse for some State service: in a word, that you conceived yourself to be under a legal obligation to part with the animal, whereas in truth and in fact no such obligation existed. If, when the mistake is discovered, the act of transfer were to be affirmed, the purchaser would find that he had made an unexpected gain, the vendor that he had suffered an unforeseen loss. But, as we have already seen, the 'good of gain' is not to be compared with the 'evil of loss': besides, this case may be regarded as one of 'undue coercion.'

Subornation to the Commission of Crime.

Mistaken Belief in Existence of a legal Obligation

Mistaken  
Belief as to  
Value.

(§) *Erroneous Belief as to Value.*—If, when parting with anything, I am in ignorance of some circumstance which tends to increase its value, I shall, on discovering my error, experience the feeling of regret which accompanies a loss. But is that a sufficient ground for avoiding the bargain? On the one hand, if such a ground of annulment be unreservedly allowed, we run a grave risk of discouraging trade; for what security can I have for any acquisition I may make if it is to be open to the former owner to break his bargain by simply saying: ‘I did not know what I was about’? On the other hand, I should certainly feel a keen pang of regret, if, after having sold a diamond as a fragment of crystal, I could find no means of recovering it. To hold the balance equal between the parties, we must adapt ourselves to the many diversities of circumstance and subject-matter. We must always inquire very closely whether the ignorance of the vendor was not the result of some negligence on his part; and, even if the case be one that calls for cancellation of the contract, we must, above all things, take care to provide for the due protection of the buyer, whose interest would point, of course, towards a confirmation of the bargain.

Exchanges  
should not  
be cancelled  
by reason of  
Disadvantages  
accruing  
subsequently  
to the  
Bargain.

But it may well happen that a contractual arrangement, free from all these defects, will yet, in the end, turn out to be attended by some disadvantage. You bought this horse for a particular journey, and the journey is never made. You were ready to start, when the jade fell ill and died. You set out on your journey, but the animal threw you and broke your leg. You bestride your steed, but it is with the object of committing highway robbery. The fancy which led you to make the purchase has passed away, and you resell at a loss. We can conceive an infinite number of such contingencies—cases in which something, no matter what, acquired on account of its value for some purpose, becomes useless, or burthensome, or hurtful either to the acquirer or to somebody else.

Now, do not these cases constitute exceptions to the general rule that every exchange imports advantage? Do they not furnish reasons for avoiding a bargain as sound as any others which have been advanced for such avoidance? The answer is, No!

All these adverse contingencies are but casual events, arising after the conclusion of the bargain. In ordinary cases, an article is worth what it will fetch. The aggregate advantage of beneficial exchanges is far greater than the aggregate disadvantage of unprofitable bargains. The gains of commerce exceed the losses, as may be judged from the fact that the world is richer in our own time than it was in the rude days of old. Sales and exchanges ought, therefore, in general to be encouraged. But to cancel them on the ground of casual and accidental loss or disadvantage would be in the nature of a prohibition; for no one would be willing to sell, no one would consent to buy, if the bargain might at any moment be avoided, in consequence of some subsequent event which could not be prevented nor, even, foreseen.

(7) *Legal Prohibition.*—There are certain cases in which the legislator, foreseeing the mischief that may arise, prohibits agreements in advance. It is thus that, in several countries, spendthrifts are placed under an ‘interdict’; that is to say, all bargains made with them are declared void. But, from the beginning, the circumstance that creates the risk of loss is palpable enough—that is to say, the bent or disposition which renders a spendthrift unfit to manage his affairs. And everyone may readily learn of the *incapacity* with which such an one is struck by the protecting hand of Justice.

Legal Prohibition of Contract:  
Prodigals;  
Infants;  
Madmen.

In every country a similar ‘interdict’ is promulgated in the two analogous cases of Infancy and Insanity. I say analogous, because what a child is for a time that one can delimit tolerably well (albeit by lines of demarcation always more or less arbitrary) a madman is for a time that



is indeterminate or, it may be, con-terminous with his natural life.

The reason for prohibition is the same as in the case of spendthrifts; for minors and persons of unsound mind are, in the nature of things, either ignorant, rash, or prodigal. This we may assume as a matter of general observation, which does not need to be proved by particular instances.

It is, of course, manifest that this kind of 'interdict' can extend only to transactions of a certain degree of importance. To apply it rigorously to the acquisition of trifling objects of daily consumption would amount to condemning all three classes to die of hunger.

Prohibition  
from prob-  
ability of  
injurious  
conse-  
quences.

(θ) *Things likely to become Hurtful by the Exchange.*—In conclusion, we must note that the law avoids certain bargains on account of some probable *inconvenience* that may result. Suppose that I have property situate on the frontier of the country. If it got into the hands of the neighbouring power, my estate might become the centre of hostile intrigues, or facilitate warlike preparations that threatened danger to my fatherland. Whether or no such results occur to my mind, it behoves the law, in the public interest, to note them very carefully, and to obviate any possible mischief from transactions of this type, by refusing in advance to accord to them its sanction.<sup>1</sup>

To this same head we must refer the restraints which it has been thought right to place upon the sale of drugs capable of being employed as poisons. So, too, any prohibition of the sale of murderous weapons; as, for example, stilettos, of which such frequent use is made in Italy even in the course of quite trifling quarrels. And on the same

<sup>1</sup> Most States, perhaps without due consideration, have met this danger by a general prohibition against the acquisition of land by foreigners. But this is going too far. The reason for such prohibition does not extend beyond the particular case mentioned in the text; and, indeed, the foreigner who wishes to buy real estate in my country gives the least equivocal proof of his goodwill towards it, and the surest pledge of good behaviour. The State can but gain by the transaction, even from a financial point of view (Dumont).

ground, well or ill founded, rest all prohibitions relative to the introduction or sale of certain articles of commerce.<sup>1</sup>

In most of these cases it is customary to say that the 'contract is void in itself.' It is only necessary to open the law books to see what balderdash has been based on this mistaken notion, and into what pitfalls the lawyers have plunged by failing to grasp that the only cause for avoiding contracts, made in these circumstances, is that they are attended by more evil than good. Having pronounced these transactions to be void in themselves, it would follow, if, indeed, we are to be consistent, that they ought to be of none effect—that we must wipe them out altogether, and leave not a wrack behind.

Contract should not be deemed 'void in itself.'

But there are many cases in which, without changing the substance of the original bargains, it will suffice to modify them and adjust any inequalities by the provision of compensation.

Modification of Bargains.

No bargain is void in itself: no bargain is valid in itself. In every instance, it is the law which grants or refuses validity; but the grant or refusal, as the case may be, must always be accompanied by reasons. Equivocal generation<sup>2</sup> is banished from sound physiology: one day, perhaps, it will be banished, in like manner, from the science of jurisprudence. This 'void in itself' is neither more nor less than a form of equivocal generation.

3. *Of Obstacles to the Alienation of Land.*—To say that the power of alienation is useful is as much as to say that arrangements which tend to prevent its exercise are, in general, highly injurious.

It is only in respect of real property that such anomalous arrangements have been adopted, whether in the form of entails or in the guise of inalienable endowments.<sup>3</sup> And

Obstacles to Alienation of Land.

<sup>1</sup> *E.g.*, opium. (C. M. A.)

<sup>2</sup> Or, *epigenesis*, as when minute animals are apparently formed from putrefaction (*generatio equivoca* or *spontanea*). *Cf. ante*, p. 217, n. (ii). (C. M. A.)

<sup>3</sup> Upon the whole, nothing can be more absurd than perpetual entails. . . . Piety to the dead can only take place when their memory is

yet, in addition to the general reasons in favour of powers of alienation, there are peculiar reasons for the existence of such powers in the case of landed estates.

Objections  
to Creation  
of such  
Obstacles.

( $\alpha$ ) He who seeks to get rid of an estate shows plainly enough that it is not fitting for him to keep it. It is probable that he cannot, or will not, spend anything on its improvement; often, indeed, he cannot refrain from depreciating its future value in order to satisfy some present need. But, on the other hand, the man who is anxious to purchase the property has certainly no intention of diminishing its value; while it is very probable that he proposes to enhance it.

It is true that the capital which is employed in the improvement of an estate might equally well be employed in commerce; but, although the advantage accruing from either form of employment might prove the same so far as the individual is concerned, it will not be the same to the State. If applied to agriculture, a given portion of wealth is more fixed and permanent than if applied to the transient purposes of trade. In the one case it is immovable; in the other, it may be transferred at the will of the proprietor.

( $\beta$ ) By mortgaging real property we can raise productive capital. In this way, a portion of the value of one part of an estate may be employed in improving the condition of another part of it; while, without recourse to such an expedient, it is possible that the improvements could not have been effected at all. To hinder the free transfer of land is, therefore, to diminish productive capital almost, it may be, to the extent of the selling value of the land; for property cannot be mortgaged unless it is capable of being alienated.

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fresh in the minds of men; a power to dispose of estates for ever is manifestly absurd. The earth and the fulness of it belongs to every generation, and the preceding one can have no right to bind it up from posterity; such extension of property is quite unnatural' (Adam Smith's *Lectures on Justice and Police*, ed. E. Cannan, 1896, p. 124). (C. M. A.)



It is true that we are here dealing only with a loan, so that there is no new capital created by the transaction. This same capital might, perhaps, have been employed, not less usefully, by the mortgagee; but it must be observed that the ampler the opportunities for the application of capital, the more of it will flow into the country. That which is provided by the foreigner forms a clear addition to that already possessed by the inhabitants of the country.

These restraints upon alienation, although condemned by every principle of sound economics, obtain almost universally. No doubt they have diminished by degrees, in proportion as governments have better understood the interests of trade and agriculture; but there still remain three causes which operate to maintain them :

Causes  
operating  
to main-  
tain Re-  
straints on  
Alienation  
of Land.

First stands the desire to check prodigality. But to obviate this evil, it is in no wise necessary to prevent the sale of land. It will be sufficient to keep up the value, by not leaving its assessment to the whim of the individual prodigal. In a word, the specific remedy for this inconvenience is the interdiction of sales at undervalue.

Desire to  
check Pro-  
digality.

The second cause is family pride, consorting with that agreeable illusion which pictures the successive existence of our descendants as a prolongation of our own. To leave to them the same, or about the same, aggregate of wealth is not enough to satisfy our imagination; we must needs assure to them the same lands, the same houses, the same natural objects. This continuity of possession passes for a continuity of enjoyment, and offers a basis of support to a fanciful sentiment.

Family  
Pride.

The third cause is love of power, the desire of exercising control after death. The preceding cause or motive presupposes posterity, while this does not. It is to this cause that we must refer all endowments; as well those which are directed to some object of utility, although it may be ill understood, as those which owe their origin to a mere whim.

Love of  
Power  
leading to  
Endow-  
ments.

If the endowment is directed simply to the distribution



of benefits, without imposing any condition or exacting any service, it seems innocent enough, and its continuance is not an evil. We must, however, except foundations for administering doles, allotted without due discrimination, and calculated only to subsidize mendicity and sloth. The best of these endowments are those for bestowing charity upon persons who, in former days, were of somewhat superior condition; for such bounties afford an opportunity of conferring on these unhappy creatures more generous relief than the general regulations would allow.

As to the benefits which are granted only on condition of the fulfilment of certain duties—as in the case of Collegiate Corporations, Convents, and Churches—their tendency is useful, indifferent, or harmful, according to the nature of the duties exacted.

Respect  
paid to  
Endow-  
ments.

It is a strange circumstance, and one worthy of remark, that these endowments—these special laws which the individual has established by the indulgence of the sovereign—have generally been treated with more respect than public laws, which spring directly from the sovereign himself.

When a legislator has sought to tie the hands of his successor, the attempt has generally seemed ridiculous, and has always proved of no avail. Yet, when the most obscure individuals have arrogated to themselves a privilege of this kind, no one has dared to say them nay !

It would seem, on general principles, that estates left to Corporations, Convents, and Churches, must needs decline in value. Unconcerned for their successors, who are not bound to them by any tie of blood, the proprietors for the time being will be apt to drain, to the utmost, property in which they enjoy but a life interest, and perhaps also, in the case of a single proprietor advanced in years, to neglect the necessary repairs. This undoubtedly happens on occasion; but we must, nevertheless, do justice to religious communities. They are oftener distinguished by good than by bad management. While their situation

is such as to inflame avarice and greed, it tends at the same time to repress display and prodigality. If there are causes operating to excite selfishness on the part of the proprietors, yet there are others which fight against it through what is called *esprit de corps*.

It is hardly worth while to enlarge upon the alienation of public property—that is to say, things of which the use is public, such as roads, churches, and markets; for it is obvious that, in order to attain their end, their duration must necessarily be permanent or indefinite, subject to such changes as circumstances may require.

## CHAPTER XX.

### ANOTHER MEANS OF ACQUISITION: SUCCESSION.

Objects to be kept in view when framing laws of succession.

ON a man's death, the question arises, How ought his property to be disposed of ?

It must be ascertained who shared in the property of the deceased during his lifetime, and in what proportions.

The legislator should have three objects in view, in framing any laws of succession: (1) To provide for the subsistence of the rising generation; (2) to prevent the pain of disappointment; and (3) to aim at the equalization of fortunes. Man is not a solitary being. With very few exceptions, there gather around him a group of associates, more or less numerous, who are bound to him by ties of kinship, marriage, friendship, or service—who, *in fact*, share with him the enjoyment of property which, *in point of law*, belongs to him alone. For many of them, his fortune is, commonly, the sole source of subsistence; and, if we seek to avert the misfortunes which would fall upon these people should death, in robbing them of their benefactor, deprive them also of the subsidies drawn from his fortune, we must ascertain who it was that shared in the enjoyment of his property, and in what proportions.

Recourse must, for this purpose, be had to general presumptions.

Now, as these are facts which could not be ascertained by direct and positive proof without an entanglement of infinite disputes and much intricate procedure, it has been found necessary to have recourse to general presumptions, as the only basis on which a law can be established.

The share in the property of the deceased formerly enjoyed by any particular survivor is to be presumed from the degree of affection which may be supposed to have subsisted between the two; and it might be said that this

degree of affection may, in turn, be presumed from the proximity of kinship.

Now, if such proximity could be treated as the only consideration, the law of succession would be a very simple matter. In the *first* degree of relationship to yourself there stand all those who are related without any intermediate connection: your wife, your husband, your father, your mother, and your children. In the *second* degree there stand all those whose connection with you involves the intervention of a single individual, or the joint intervention of a couple of individuals: your grandfathers and grandmothers, your brothers and sisters, and your grandchildren. In the *third* degree come those whose connection involves two intermediate generations: your great-grandfathers and great-grandmothers, your great-grandchildren, your uncles and aunts, nephews and nieces.

But, although such an arrangement would be absolutely perfect so far as simplicity and uniformity are concerned, it would not serve the political and moral ends which must be kept in view. Nor would the arrangement really be one based on the degrees of affection, of which the degrees of relationship are supposed to afford presumptive evidence; while it certainly would not accomplish the principal object, which is to provide for the wants of the rising generation. Let us, then, give the go-by to this genealogical arrangement, and adopt one founded upon the principle of utility: it consists in always *giving to the descending line, however long, a preference over the ascending or collateral line*—in giving the preference to every one of the descendants of each parent, at the expense of all those who cannot be reached without taking another step in the ascending line.

Descending line should have preference over ascending or collateral line.

It must, however, often happen that the presumptions of affection and of need, which form the basis of the scheme, will, in practice, prove ill-founded, so that adherence to the rules would result in failure; but, as we shall see, the



power of disposition by will offers an effective remedy for the defects of the general law, and this, indeed, supplies the principal ground for maintaining the existence of such a power.

So much for general principles. But how ought they to be applied in detail when it becomes a question of deciding between a crowd of claimants ?

The model of a statute, in the form of a code, will serve in the place of elaborate disquisitions.

ARTICLE I.—*Let there be no distinction between the sexes ; what is said of one sex extends also to the other. The portion of the one shall always be equal to that of the other.*

REASON—*The Advantage of Equality.*—If there be any difference, it should be in favour of the weaker sex—in favour of women, who have more needs, coupled with less opportunity of acquisition and less chance of employing profitably the means which they possess. But it is the stronger who, in point of fact, have always enjoyed the preference. Why ? Because the stronger have made the laws.

ARTICLE II.—*After the husband's death, the widow shall retain half the common property, unless the marriage contract expressly provides otherwise.*

ARTICLE III.—*The other half shall be distributed among the children, in equal shares.*

REASONS.—(α) Equality of affection on the part of the father ; (β) equality of joint occupation on the part of the children ; (γ) equality of needs ; (δ) equality of all imaginable reasons on the one side and on the other. Differences of age, temperament, talent, strength, etc., may bring about certain differences in their actual needs ; but it is impossible for the law to assess such differences. It is for the father to provide for them by exercising his right of making a will.

ARTICLE IV.—*If the child die before the father, leaving children, the share of such child shall be divided among his*

Suggested  
model  
statute.

No distinction  
between  
sexes.

Widow to  
retain half  
of common  
property.

Other half  
to be dis-  
tributed  
among  
children  
in equal  
shares.

Share of  
deceased  
child to go  
to that  
child's  
issue.

children in equal portions ; and so on for all their descendants to any degree.

REMARKS.—This distribution *per stirpes*, instead of a distribution *per capita*, is preferred for two reasons: (a) To prevent the *pain of disappointment*. That the portion of an elder child should be diminished by the birth of each younger one is a natural event which should be well within the range of expectation. But, as a general rule, when one of the children begins to exercise his reproductive faculty, that of the father is nearly exhausted; and, at that time, his children naturally suppose that they have reached the point when there will be no further diminution of their respective portions. If, however, each grandson or granddaughter were to produce a diminution in like degree as each son or daughter, the final diminution would know no limit; and there would cease to be any fixed data on which to form a plan of life. (β) Grandchildren have, as an immediate resource, the property of their deceased father. It is in respect to the fruits of the paternal industry, for the most part if not exclusively, that they have been used to enjoy a joint occupation, apart altogether from their grandfather. It should be added that, in the property of their mother and her relations, they have a resource which is in no wise open to the other children of their grandfather.

ARTICLE V.—*If there be no descendants, the property shall go to the father and mother, in common.*

If no issue property to go to parents in common.

REMARKS.—Why to descendants before all others ? (a) *Pre-eminence in the matter of affection.* Any other arrangement would be opposed to the wish of the father. We love those who depend upon us better than those upon whom we depend. It is more agreeable to command than to obey. (β) *The circumstance that their need is greater.* It is quite certain that our children could not exist without us, or someone who should take our place. It is probable that our parents could exist without us, as they existed before we came into being.

Observations on the giving of the preference to descendants ;

And on the giving of the preference to parents over brothers and sisters.

Why should the succession pass to the father and mother rather than to the brothers and sisters? (1) The fact of closer relationship raises a presumption of superior affection. (2) It is a return for services rendered, or, as we may put it better, compensation for the cost and cares of education. What constitutes the relationship between my brother and myself? Our common kinship with the same father and the same mother. What is it makes him dearer to me than any other comrade with whom I may have spent an equal portion of my life? It is because he is dearer to those who have the first hold on my affections. It is not certain that I owe anything to him; but it is certain that I owe everything to them. Hence, at all times when the stronger claims of my children do not conflict with such action, I ought to make my parents a recompense to which no brother can pretend.

If either parent be dead, the share to go to his or her descendants;

ARTICLE VI.—*If either of the two parents be dead, the portion of the deceased shall go to his or her descendants, in the same way as it would have gone to the intestate's own descendants.*

REMARKS.—In the families of the poor, whose property consists solely of household furniture, it will be better that everything should pass to the surviving father or mother, subject to the burden of providing for the maintenance of the children. The expenses attendant upon a sale and the dispersion of the effects would greatly impoverish the survivor, while the portions, too small to serve as capital, would soon be dissipated.

And in default to surviving parent. Case of death of both parents.

ARTICLE VII.—*In default of such descendants, the whole of the property shall go to the surviving parent.*

ARTICLE VIII.—*If both father and mother be dead, the property shall be divided, as indicated above, among their descendants.*

ARTICLE IX.—*But the share of the half-blood shall be only half as great as the share of the whole blood, if any such there be.*

REASON—*Pre-eminence in the Matter of Affection.*—Of the two ties that bind me to my brother, there is one only that binds me to my half-brother.

ARTICLE X.—*In default of relations in the degrees afore-* Case of no relations within fixed degrees.  
*said, the property shall pass to the public exchequer.*

ARTICLE XI.—*But only on condition of distributing the interest by way of life annuities among surviving relations in the ascending line, in whatever degree, in equal portions.*

REMARKS.—The last two Articles may be adopted or not, according to the state of the particular country in relation to taxes; but I have been unable to find any sound objection to this fiscal resource. It will be said that the collateral relations, excluded by this arrangement, may be in a needy condition; but their need is a circumstance, in itself, too casual to justify the framing of any general rule of law. They have, as a natural resource, the property of their respective parents; and they cannot have formed their expectations or based their plan of life in reliance on any such contingency. On the part of an uncle, even, the expectation of taking by inheritance from his nephew must be very slight; and a positive law would be quite enough to lay any such hope quietly to rest, or to prevent its ever being born. An uncle has not the claims of a father or grandfather. It is true that, in the event of their death, the uncle may have filled their place and acted as a father to his nephew. That is a circumstance which well deserves attention by the legislator. The power of testamentary disposition may serve to meet such a case; though, of course, that mode of obviating any inconvenience arising from the general law would be of none effect should the nephew die at a tender age, before he acquired the right to make a will. If, then, it were desired to modify this fiscal regulation, the first exception should be in favour of an uncle; it may be so far as the capital value of the property is concerned, or it may be so far only as affects the interest derivable from it.



In case of division, property to be sold by auction.

ARTICLE XII.—*To effect a division among several heirs, the property shall be put up to auction, reserving to such heirs the right of making any other arrangement if they are all agreed.*

REMARKS.—This is the only means of avoiding community of goods, an arrangement of which we shall show elsewhere the pernicious consequences.<sup>1</sup> Any goods comprised in the inheritance, which possess a value ‘of affection,’ will find their true price by reason of the competition of the inheritors, and will be applied to the common advantage, without giving rise to the family disputes which sometimes occasion lasting ill blood.

Pending sale, etc., eldest male to have custody if of full age;

ARTICLE XIII.—*Pending the sale and distribution, everything shall be entrusted to the care of the oldest male of full age, with power to the court, for good cause, to make other arrangements if there be apprehension of bad management.*

REMARKS.—Women, as a rule, are less fitted than men for money matters or intricate business; but a particular woman may have some special aptitude, and, if such an one be recommended with the general approval of the relatives, she ought to be given the preference.

In default, to his guardian.

ARTICLE XIV.—*In default of a male inheritor of full age, everything shall be entrusted to the guardian of the oldest male, reserving a discretionary power as in the last Article.*

If property goes to Crown, same to be sold by auction.

ARTICLE XV.—*The succession which, for want of natural inheritors, falls to the public exchequer shall, in like manner, be disposed of by auction.*

REMARKS.—A Government is incapable of deriving the greatest advantage from specific pieces of property. Their administration of such property costs much, yields little, and leads to rapid deterioration. This is a truth which Adam Smith has established.<sup>2</sup>

General remarks.

It seems to me that this statutory scheme is simple, concise, and easy to be understood; that it does not lend itself

<sup>1</sup> See *post*, pp. 257 *et seq.*

<sup>2</sup> Cf., e.g., *Wealth of Nations*, book v., chap. ii., part i.; and see book v., chap. i., part iii., art. i. (C. M. A.)

to chicane, fraud, or diversity of interpretation. It seems, moreover, to conform with the affections of the human heart and with the inclinations which so constantly spring from our social relations. It is, therefore, calculated to conciliate, as well the favour of those who lean to considerations of sentiment as the approval of those who base their judgments on reason and argument.

Such as censure my plan for its simplicity, and conclude that, at this rate, the law would no longer be a science, may find wherewith to satisfy themselves, and, indeed, find cause to marvel, in the labyrinth of the English common law of succession. To give my readers any idea of the difficulties of this subject, it would be necessary to begin with quite a dictionary of new words; and then, when they discovered the absurdities, subtilties, cruelties, and frauds, with which the system abounds, they would suppose that I had composed a satire, and wished to insult a nation otherwise so justly renowned for its wisdom. But, on the other hand, we ought to note that the power of making a will reduces this evil until it is confined within tolerably narrow limits. It is only in the case of successions following on intestacy that we are compelled to travel along the winding and devious paths of the common law. Wills may, therefore, be likened to the arbitrary pardons which temper the harshness of our penal laws.<sup>1</sup>

<sup>1</sup> Between 1803 and 1810, although no fewer than 1,872 persons were sentenced to death for minor thefts and divers small offences against property, one only of those sentences was in fact executed. Down to the end of the reign of William IV., after every sitting at the Old Bailey a report was made by the Recorder to the King in Council, the King himself being always present in person. The list of cases was then carefully examined with a view to the granting of pardons. See Stephen's *History of Criminal Law*, vol. ii., p. 88. (C. M. A.)

## CHAPTER XXI.

### CONCERNING WILLS.

The Law cannot make detailed provision for Succession in individual Cases.

1. THE law, having no cognizance of the varying circumstances of particular persons, cannot accommodate itself to the diversity of their wants. All that can be required of it is to afford individuals the best possible opportunity of meeting and providing for those wants. It remains for the particular property owner, who can and ought to know the special circumstances in which those who depend upon him will be found at his death, to correct the imperfections of the law in events which it could not anticipate. The power of making a will is an instrument placed in the hands of individuals for the prevention of private distress.

Utility of the testamentary Power.

2. This same power may also be regarded as an instrument of authority, entrusted to individuals for the encouragement of virtue and the repression of vice in the family circle. The force might, it is true, be employed to produce an exactly opposite effect; but instances of such uses are, happily, rare. It is, in fact, the interest of each member of a family that the conduct of every other member should conform with virtue—that is to say, with general utility. Passion may prompt casual deviations; but the laws must be framed with reference to the ordinary course of events.

Virtue is the staple element in society; and we find even vicious parents prove themselves as jealous as other folk for the probity and repute of their offspring. Many a man, lax enough in his business relations, would be greatly concerned if his secret practices were revealed in the bosom of his family; and, amidst the home circle, he will never

cease to pose as an apostle of the integrity on which he insists in those who there attend him.

In this regard, then, every property owner should enjoy the confidence of the law. Clothed with the power of making a will, which involves the exercise of a sort of legislative function in the matter of rewards and punishments, the man may be looked upon as a magistrate appointed to preserve good order in the tiny kingdom which is called his family. Now, this magistrate may well prove partial or unjust; and, as he is not restrained either by publicity or by responsibility, he would seem likelier than another to abuse his power. But this risk is more than counter-balanced by the bonds of interest and affection, which incline his disposition to accord with his duty. The natural attachment to his children or kinsmen supplies a pledge of good conduct, as binding as any that can be secured in the case of a political magistrate. So true is this that, all things considered, the authority of this non-commissioned magistrate, besides being absolutely essential so far as young children are concerned, will, even as to adults, be oftener found to prove salutary than hurtful.

3. The power of making a will is of advantage from another point of view. It affords its possessor an opportunity of appearing in the character of 'master,' not for the good of those who obey, as displayed in the preceding article, but for the benefit of the man himself, who is thus in a position of command. For by this means the power of the present generation may, in some measure, be spread over the future; and, in a sense, the wealth of each property owner may be doubled. By the expedient of a bill or assignment not operative until he shall be no more, the proprietor may procure for himself a number of advantages outside the range of his actual endowments.

Power of making a Will is of advantage to Testator during his lifetime.

By extending the submission of children beyond the term of their minority, the return for paternal care is enlarged; while, as a parent, he secures an additional assur-

It operates to prevent Ingratitude.



ance against ingratitude. And, though it would be pleasing to think that such precautions are superfluous, yet, when we reflect upon the many disabilities of old age, we feel that they ought to be counterbalanced so far as possible by artificial attractions. When the sands are swiftly ebbing in the hour-glass of life, we should foster every form of support, and it is not without advantage that interest should then be found to serve as a monitor to duty. It will be said that, in civilized societies, ingratitude on the part of children and a contempt for old age are not, in fact, common vices; but we must not forget that, in greater or in less degree, the power of making a will already exists everywhere. It would, however, be possible to inquire whether these vices are more prevalent where this power is more restricted; and we might, accordingly, propose to settle the question by seeing what happens in the families of the poor, who have very little to leave behind. But this mode of settlement would still be imperfect; for the influence of the testamentary power, established as it is by the laws, tends to form the manners of society in general, and these manners, in turn, mould the feelings of individuals. The power thus conferred on the father enhances regard for parental authority; and though, by reason of his poverty, he may have no opportunity of exercising such authority, yet he is unconsciously benefited by the general habit of submission engendered by its existence.

But, in making a magistrate of the father, we must be very careful not to make him a despot. If the children are prone to err, so also is he; and, though we may give him the power of penalizing them, it does not follow that he should have the right of driving them to perish by hunger. Thus the institution of what is called in France a *légitime* provides a convenient mean between domestic anarchy and tyranny. Even of this *légitime* the father ought to be able to deprive his child on grounds prescribed by law and judicially proved to exist.

Testator  
must not  
be allowed  
to become  
a Despot.

Still another question arises. In default of natural inheritors, should the property owner be allowed to leave his estates to whomsoever he may please, whether distant kinsmen or strangers in blood? In that event, the fiscal resource of which we treated in the article on successions would be greatly reduced; it would be entirely confined to the case of intestates. Here the reasons of utility conflict, and we must therefore seek for some middle course.

In default of natural inheritors, should the testamentary power continue to be absolute?

On the one hand, it may be urged that, in default of relatives, a man must needs resort to the good offices of strangers, for whom he conceives an attachment almost as strong as that which would have bound him to kinsmen. He ought, therefore, to be in a position to encourage the expectations and reward the attentions of a faithful servant, or to soften the regret of a friend who has grown old in close companionship with him; not to speak of the woman who, for want of some ritual observance, lacks the title of 'widow,' or of the bereaved offspring who, in the eyes of everybody except the legislator, are his children.

Again, if, to swell the public exchequer, you deprive a man of the power of leaving his property to his friends, will you not drive him to spend everything on himself? If he has no control over the disposal of his capital after the hour of his death, will he not be tempted to convert it into annuities terminable with his life? This would be to encourage him to be a spendthrift, and almost amount to making a law against economy.

These reasons certainly outweigh any considerations based on gain to the public treasury. We ought, at least, to concede to the property owner, who has no near kinsmen, the right of disposing of one-half of his property by will, while reserving the other half for the public. And, indeed, in this case, to be content with less would, perhaps, be the means of obtaining more. But it would be better still to refrain from any attack on the principle which would allow to everyone the disposal of his property after death,

and to refrain from the creation of a class of proprietors who would look upon themselves as inferior to others by reason of the legal embargo imposed on one-half of their fortune.

Principles  
as to  
Alienation  
apply to  
testamen-  
tary Trans-  
fers.

All that has been said concerning alienations on the part of living persons will apply, with equal force, to testamentary transfers. On most of these points we shall be led to a just conclusion by considering the conformity between the two forms of assignment, but on a few points by considering the contrast between them.

The same causes of avoidance or nullity, which apply to alienations by the living, apply also to wills; save that, in place of 'unfair concealment' on the part of the transferee, we must substitute 'erroneous supposition' on the part of the testator. For example, I bequeath certain property to Titius, who is married to my daughter, supposing the marriage to be valid, and in ignorance of the bad faith of Titius, who had contracted a previous, and still subsisting, marriage.

'Death-  
bed' Testa-  
ments.

In dealing with wills, the legislator is placed in a somewhat awkward dilemma. Suppose he allows their validity when made on the death-bed: testators would, at such a time, be exposed to undue coercion and fraud.

Suppose he insists on formalities incompatible with this indulgence. A testator might then find himself deprived of succour at the moment of his greatest need: inhuman inheritors might afflict him to hasten or assure the benefits of a will already executed in proper form. A dying man, who has nothing to give and nothing to take away, is no longer to be feared. A number of detailed provisions would be necessary to reduce all these opposite risks to the lowest danger-point.

## CHAPTER XXII.

### OF RIGHTS RESPECTING SERVICES, AND THE MEANS OF ACQUIRING THEM.

AFTER *things* have been disposed of, it remains to distribute *services*, a kind of property sometimes confounded with things, sometimes presented in a distinct form.<sup>1</sup> How many kinds of services are there? As many as there are ways in which man can prove useful to man, whether by procuring for him some good or by shielding him from some evil.

Various kinds of services.

In the exchange of services which constitutes social intercourse, some services are voluntary, while others are compulsory. Those which are exacted by law assume the form of rights and obligations. If I have a *right* to the services of another, that other is in a condition of *obligation* towards me: the two terms are correlative.

Rights and Obligations.

All services were originally of a voluntary character; and it is only by slow degrees that the laws have interposed to convert the more important into positive rights. It was in this way that the institution of marriage transformed the hitherto voluntary relations between husband and wife, parent and child, into relations of legal obligation. In certain states, the law has, in like manner, converted into the form of legal obligation the maintenance of the poor—a duty which, among most nations, still remains indefinite and in no wise compulsory. *Political* duties of this kind, in contrast with duties purely *social*, may be likened to small enclosures in some common of vast extent, wherein a par-

Voluntary as distinguished from compulsory services.

<sup>1</sup> For a fuller discussion of 'services,' see *Introduction to the Principles of Morals and Legislation*, chap. xvi. (26). (C. M. A.)



ticular kind of culture is fostered with such precautions as will assure success. The same plants might grow on the common, and might even be protected under special arrangements; but they would always be exposed to greater risks than in the special precincts prescribed by the law and safeguarded by public authority.

Yet, whatever the legislator may do, there will always remain a vast number of services that escape his grip: he cannot regulate or control them because he cannot define them; or, perhaps, because the constraint would change their character and render them actually mischievous. Any attempt to enforce them by punishment would involve a complex system of inquisitions and penalties, such as would plunge society into a state of terror. Besides, the law could not cope with the real obstacles standing in the way of their performance: there are many hidden forces it could not bring into play, nor could it create that energy, that abounding zeal, which surmounts all difficulties, and is a thousand times more potent than the most express injunctions.

Operation  
of Moral or  
Social Code.

But the imperfection of the law in this regard is corrected by a sort of supplementary law—in other words, by the moral or social code, a code which is unwritten, rests altogether on public opinion, manners, and usages, and begins just where the legislative code ends. The duties it prescribes, the services it imposes, under the names of equity, patriotism, courage, humanity, generosity, honour, disinterestedness, do not seek the aid of the laws directly, but derive their efficiency from other sanctions which supply the penalties and rewards. As the duties of this secondary code do not bear the impress of the law, their discharge is accompanied by more *éclat*—is more meritorious; and the overplus in the matter of honour happily makes up for any deficiency in binding force.

Obligatory  
services.

After this digression upon morals, let us get back to legislation,

The kind of service which figures most prominently is that which consists in disposing of some form of property in favour of one's fellow. The kind of property which plays the most important part in a civilized community is money, a measure of value almost universal. It is in this way that the consideration of *services* so often leads us back to the consideration of *things*.

In some cases, it is necessary to exact a service in the interest of the superior who calls for its performance, as, for example, where the relation is that of master and servant. In other cases, the right to exact service is established in the interest of the inferior who performs it, as, for example, when the relation is that of guardian and ward. These two correlative conditions form the basis of all other social conditions: the rights which attach to them supply the elements of which all the others are composed. The father ought in certain respects to be the guardian, and in others the master, of his child. The husband ought in certain respects to be the guardian, and in others the master, of his wife. These conditions are, moreover, capable either of a certain or of an indefinite duration, and constitute the fabric of domestic society: the rights which should properly be attached to them will be discussed hereafter.

The public services of the magistrate and of the citizen give rise to other classes of obligations, but their determination belongs to the constitutional code. There are, however, besides these constant relations, certain transitory and casual relations in which the law may require the services of one individual in favour of another.

The means of acquiring rights to services—or, in other words, the causes which lead the legislator to create obligations—may be referred to three heads:

(1) *Superior Need*; (2) *Former Service*; (3) *Agreement or Contract*. Let us return to examine these heads in detail.

Causes  
leading to  
the Creation of  
Obligations.

Superior  
Need.'

I. SUPERIOR NEED.—That is, where 'the need for the service is greater than the inconvenience incurred in rendering it.'

Negative  
offences.

The care of his own well-being forms every man's constant occupation—an occupation no less legitimate than necessary.<sup>1</sup> For, suppose that we could reverse the principle and cause the love of others to predominate over the love of self, there would result a state of affairs most absurd and disastrous. Yet many occasions arise when it is possible to enhance materially the well-being of others by some slight, perhaps imperceptible, sacrifice of one's own comfort. And, in such circumstances, to do what lies in one's power to avert an evil about to overtake another is a service which the law might well make compulsory; while the omission to perform such a service, in cases where the law had thought fit to exact it, would constitute a sort of offence which might be styled 'negative,' in contradistinction to a 'positive' offence, committed by a delinquent who is himself the direct and instrumental cause of mischief.

Compul-  
sory 'Obl-  
igation to  
afford  
succour.

But to exert effort, however slight, may amount to an evil: it certainly does if such exertion be made compulsory, for every form of constraint is an evil. We thus see that, if the law is to exact from *you* some service in favour of *me*, the evil of not receiving it must needs be so great, and the evil of rendering it so small, that there can be no hesitation in producing the latter so as to avoid the former. There are no means of fixing precise limits: every decision must have reference to the special circumstances of the particular parties, and it must be left to the judge to determine individual cases as they arise.

<sup>1</sup> Cf. Bowring, x. 68, and Bentham's manuscript note: 'There is no man that doth a wrong for the wrong's sake, but thereby to purchase himself profit or pleasure. This grand truth was not hidden from Lord Bacon. His was a mind to be struck by the beauty of truth wherever it met him, but his was not an age when to pursue it to the utmost was either practicable or safe.' (C. M. A.)

The good Samaritan, by succouring the wounded traveller, saved his life. It was a noble deed, a virtuous action; nay, more, it was a moral duty. But ought there to be power to make such aid a political duty, and to enforce it by means of a general law? No; not unless the law were modified by exceptions which would necessarily be of a more or less hazy character. In this particular case, for example, it would be proper to exempt a surgeon, awaited by a number of wounded men in dire need of his services—a soldier hastening to his post to repel the enemy—a parent speeding to the succour of his child in perilous straits.

The principle of 'superior need' forms the basis of a host of obligations. A father's duties towards his children may well prove burthensome to him; but the evil is as naught compared with that which would ensue if he left them destitute. The duty of defending the State may be still more burthensome; but if the State were not defended it would no longer exist. Should the taxes remain unpaid, government must come to an end; and when the public functions cease to be discharged, a door is at once opened to every kind of crime and distress.

Duty to protect one's children, and to defend the State.

It will be understood that the obligation to render a service should be cast upon any particular individual by reason of some peculiarity in his position, which seems to associate him rather than another with the ability, or the inclination, to perform it. It is on this ground that the choice of a guardian for orphan children falls upon some relation or friend, to whom the incidental duties will prove less burthensome than to a stranger.

2. FORMER SERVICE.—*Service already rendered, in consideration whereof there is exacted of him who received the benefit some compensation, if possible an equivalent, in favour of him who conferred it.*

'Former Service.'

This case is simpler; for it is only necessary to assess the value of the benefit already received, and then assign the



appropriate compensation. We need not leave so much to the discretion of the judge.

Cases in which there arises a Right to Indemnity.

A surgeon, we will suppose, has given aid to a sick person, who lay unconscious and unable to call for assistance. A bailee has, without any previous request, done work upon the object bailed to him, or made advances necessary to secure its preservation. A man has run grave risk in a fire to save valuable property, or rescue persons in danger. The goods of a private person have been thrown into the sea to lighten a vessel and preserve the rest of the cargo. In all these cases, and in a thousand others that might be cited, the laws ought to assure compensation equivalent to the value of the service. This title to an indemnity is founded upon the best of reasons. Grant the compensation, and the man who paid it will still be a gainer; refuse it, and you leave him, who has rendered the service, in the position of a loser.

Conflict between Prudence and Goodwill.

Such a regulation will, indeed, be less in the interest of him who receives the compensation than of those who stand in need of such services: it will be in the nature of a promise made beforehand to every man (to whom there is presented an opportunity of rendering a service burthen-some to himself) with the object of preventing the conflict between a selfish regard for his own interests and his spirit of benevolence.

Who shall say how many evils might be averted by a preventive measure of this kind? In how many cases has the duty of prudence restrained, and properly restrained, the promptings of benevolence? Is it not the part of a wise legislator to seek a reconciliation?

'Ingratitude.'

It is said that at Athens ingratitude was punished as an act of bad faith which tended to destroy all traffic in kindly offices, by hindering the giving of credit in such transactions. I do not propose to punish ingratitude, but, so far as possible, to prevent it. Suppose that the man to whom you have rendered a service should prove ungrateful:

well, no matter !—the law, which does not reckon upon displays of virtue, will assure you adequate compensation, and, on special occasions, will swell the compensation until it takes the form of reward.

Reward ! Yes; that is the true means of securing services. By comparison, punishment is but a feeble instrument.

Reward more effective than Punishment.

Before we presume to punish the omission of a service, we must make sure that the offender had power to render it, and had, moreover, no excuse for his omission to comply with the obligation. Now, all this would involve a process which might prove difficult and uncertain. Besides, when men act through fear of some penalty, they only do what is absolutely necessary to escape it; but the hope of reward brings into play our hidden resources, triumphs over veritable obstacles, and gives birth to prodigies of zeal and ardour in cases where threats of punishment would arouse only a spirit of sullen resistance.

In adjusting the interests of the respective parties, three precautions must be observed: (1) To prevent a feigned generosity from assuming the form of tyranny, and exacting the price of a service which would not have been accepted at all if it had not been supposed to be disinterested; (2) not to encourage the greed of gain, which would snatch a reward for services such as a man might well perform for himself, or, at any rate, have secured at a less cost; (3) not to suffer a man to be overwhelmed by a crowd of saviours coming to his rescue, all of whom could not be indemnified without countervailing the whole benefit of the service.<sup>1</sup>

Precautions to be observed in exacting Indemnities.

‘Former service,’ as will be readily understood, forms a just basis for many classes of obligation. On this is founded

<sup>1</sup> This may be applied to the situation of a King restored to the throne of his ancestors at the expense of his faithful adherents, like Henry IV. or Charles II., an unfortunate situation in which there would still be malcontents were the whole of the reconquered kingdom to be distributed by the King among his followers (Dumont).

the obligation of a child towards his parents, when, in the course of nature, the strength of a riper age succeeds the weakness of his early years: the need for receiving comes to an end, and the duty of restitution begins. And so, too, arise the rights of a wife to insist upon a continuance of the connubial union, although time may have destroyed the attractions which, in the first instance, supplied its motive.

Institutions, supported at the public charges, for the benefit of those who have served the State, rest on the same principle: reward for past services, employed as an expedient for insuring future service.

3. AGREEMENT OR CONTRACT.—That is to say, *The interchange of promises between two or more persons, upon the understanding that they shall be treated as legally binding.* All that has been said of *consent* in relation to the disposal of property applies equally to consent in relation to the disposal of services. There are the same reasons for sanctioning the interchange of services as for sanctioning the interchange of property, both resting on the same fundamental axiom that ‘every alienation imports advantage.’ No one enters into an engagement save from some motive of utility.

The same reasons which justify the annulment of consent in the one case justify it also in the other: Unfair Concealment; Fraud; Coercion; Subornation; Erroneous Supposition of Legal Obligation; Erroneous Belief as to Value; Legal Prohibition: Infancy, Madness; Pernicious Tendency of the Contract, without any fault on the part of the contracting parties.<sup>1</sup>

We shall not dwell on causes leading to the dissolution of an Agreement, which arise subsequently to the making of such Agreement: (α) Accomplishment; (β) Compensation; (γ) Express or Tacit Remission; (δ) Lapse of Time;

<sup>1</sup> To this head we may refer the English law which avoids marriages contracted by members of the Royal Family, without the consent of the King (Dumont).

\* Agree-  
ment or  
Contract.\*

Dissolution  
of an Agree-  
ment.

( $\epsilon$ ) Physical Impossibility; ( $\zeta$ ) Intervention of some Superior Inconvenience. In none of these cases do the reasons which sanctioned the service any longer exist; but it is only the last two that relate to the literal or specific execution of the bargain, and may still leave occasion for compensation. If, in a reciprocal compact, one of the parties only has performed his part, or if his part be the more nearly completed, some measure of compensation will be necessary to restore the equilibrium.

We are here merely attempting to exhibit principles without entering into details. The particular arrangements made must needs be of infinite variety to correspond with the great diversity of circumstances; but, if we grasp firmly a small number of rules, the various arrangements will not conflict with each other, and may be all approached in the same manner. Now, these rules are so simple that we may give the go-by to any development of them:

(i.) Avoid producing the pain of disappointment.

(ii.) When some measure of that evil becomes inevitable, diminish it as much as possible by dividing the loss amongst the parties interested in proportion to their means.

(iii.) Take care, in the distribution, to throw the greater part of the loss upon the man who might, by the exercise of care, have prevented the evil; and in this way you may punish him for his neglect.

(iv.) Above all things, avoid the creation of some casual evil greater even than that of disappointment.

GENERAL OBSERVATIONS.—We have thus founded a complete theory of obligations upon the basis of Utility; and have erected the whole of this vast structure on three principles: ‘Superior Need’; ‘Former Service’; ‘Agreement or Contract.’ Who would believe that, to reach notions so simple and so homely, it has been necessary to open out a new road? Consult those masters of the science—Grotius, Puffendorf, Burlamaqui, Watel, nay, Montesquieu himself, Locke, Rousseau, and the whole

General  
Observa-  
tions as to  
Obliga-  
tions.



crowd of commentators. When they are minded to trace the origin of obligations, they tell us of natural rights, of laws anterior to man, of the Divine law, of conscience, of a social contract, of a tacit contract, of a *quasi*-contract, etc. I know that these terms are not altogether incompatible with the true principle, because there is not one of them that cannot be brought, by explanations more or less verbose, to signify good and evil; but this indirect and roundabout process proclaims uncertainty and embarrassment, and leads to endless disputes.

Mere fact of  
Contract  
being entered into is  
no reason,  
in itself, to  
uphold  
validity.

These writers have not perceived that a contract, strictly speaking, can of itself afford no reason, but that it has itself need of some original and independent reason as a foundation. The agreement serves to prove the existence of mutual advantage to the contracting parties, and it is this reason of utility which supplies its force. By applying this reason, we may distinguish the cases in which contracts ought to be confirmed, as well as those in which they ought to be annulled. If the mere contract constituted a reason in itself, it would always have the same effect; but if it be its pernicious tendency which renders it void, it must be its useful tendency which renders it valid.

## CHAPTER XXIII.

### COMMUNITY OF GOODS—TENANCY IN COMMON: THEIR INCONVENIENCES.

THERE is no arrangement more clearly at variance with the principle of Utility than the holding of property in common, especially that kind of indeterminate community in which the whole belongs to everybody.

Communi-  
ty of  
goods:  
Objections  
thereto.

1. Such an arrangement is an inexhaustible source of strife and contention: far from being a state of satisfaction and enjoyment for all the parties interested, it is generally one of disappointment and discontent.

2. So far as concerns every one of the co-partners, this undivided property is deprived of a great part of its value. On the one hand, subject to dilapidations of every kind, seeing that it is not under the protecting care of individual interest; on the other, it fails to undergo any sort of improvements. Why should I be at charges, of which the burden will be certain and fall entirely upon myself, while the benefit will be doubtful and, of necessity, shared with others?

3. The apparent equality of such an arrangement serves but to veil a very real inequality. Without fear of punishment, the stronger abuse their greater strength; at the expense of the poor, the richer folk increase their treasure. This community of goods always calls to my mind the sort of monster known to come into being on rare occasions—twins joined together by a ligament. The stronger necessarily drags the weaker along.

I am not here speaking of the community of property between husband and wife. Called to live together, and

Cases to  
which in-  
conveni-  
ences do not  
attach.

to foster jointly their own interests and those of their children, they ought to enjoy in common a fortune often acquired, and always preserved, by their united efforts. Besides, if their wills conflict, the struggle will not last long; for the law confides to the husband the right of settling the dispute.

Nor am I speaking of property common to partners in trade. The object of such community is the mere acquisition of wealth, and in no wise extends to its enjoyment. Now, so far as acquisition is concerned, the partners have one and the same object, one and the same interest; and, when it becomes a question of enjoyment or consumption, each partner reverts to his original state of independence. Moreover, the persons associated in trading ventures are comparatively few in number: they combine together of their own free choice, and may break their bonds at will. So far as relates to joint-proprietorship in land, the conditions are entirely different.

Partition  
of common  
a nds.

In England, one of the most valuable and undoubted improvements has been the partition of commons.<sup>1</sup> When we travel through districts which have recently undergone this pleasing transformation, we are delighted as by the sight of some new colony. Harvests, flocks, and smiling homesteads, have succeeded to the gloom and sterility of the desert. Happy triumphs of peaceful industry! What a useful type of aggrandisement, which inspires no alarm and provokes no hostility!

But who would believe that in this island, where so much attention is devoted to agriculture, millions of acres of productive land are still left in the deplorable condition of common holdings? It is not long since the government, desirous of learning the real state of its territorial domains,

<sup>1</sup> A brief and singularly lucid account of the Enclosure Movements is to be found in Jenks's *Short History of English Law*, pp. 267-270. The necessity for checking abuses arising from the later developments of these movements was recognized by the passing of the Metropolis (Commons) Act, 1866, and the Commons Act, 1876. (C. M. A.)

began to collect, in every county, a quantity of detailed information, which has brought to light a truth so interesting in itself and so well calculated to lead to important consequences.<sup>1</sup>

Apart from accidental circumstances, the inconveniences of tenancy in common do not arise in the case of 'servitudes'—rights of partial ownership exercised over real property, such as a right of way, or a right of water-supply. These rights are, in general, of a limited nature: the value of which the servient tenement is deprived is not equal to the value acquired by the dominant tenement; or, in other words, the inconvenience occasioned to the one is not so great as the benefit conferred on the other.

In England, a freehold estate worth thirty years' purchase would, if copyhold, be worth only twenty years' purchase. The reason is that, in the latter case, there is a lord of the manor possessing certain rights which give rise to a sort of common tenancy between him and the principal owner. But it is not to be supposed that what is lost by the copyholder is gained by the lord; indeed, the greater part of it falls into the hands of the lawyers, and is wasted on useless formalities or in harassing trifles. This tenure is a relic of the feudal system.<sup>2</sup>

The feudal laws, so Montesquieu tells us, afford a glorious spectacle; and he goes on to compare them with some venerable and majestic oak-tree. Rather should he have compared them with that deadly upas-tree, the juices of which

<sup>1</sup> There may be circumstances which give rise to exceptions from all ordinary rules. Thus, the citizens of the smaller Swiss cantons possess the greater part of their lands (to wit, the High Alps) in common. It may be that this is the only convenient arrangement for pastures not available except during part of the year. It is, too, possible that this tenure of land forms the basis of a purely democratic constitution, well suited to the condition of a people shut up in the bosom of their mountains (Dumont).

<sup>2</sup> 'Villénage, or, as it was later called, "copyhold," has always been treated as a "local and customary tenure." Nevertheless, though with many differences of detail, the local tenures were framed on the common law model' (Jenks's *Short History of English Law*, p. 32). (C. M. A.)

Case of  
'servi-  
tudes.'

Copyhold  
tenure.  
The feudal  
system.



The feudal  
system—  
*contd.*

act as a poison to man, while its shade destroys all vegetable life.

This wretched system has introduced into the laws a confusion and complexity from which it is extremely difficult to free them ; and, as the system is interwoven throughout with the doctrine of ownership, it would need very skilful treatment to destroy the one without making a perilous attack on the other.

## CHAPTER XXIV.

### DISTRIBUTION OF LOSS.

'THINGS' constitute one branch of the objects of acquisition: 'Services' form another. And, having treated of the various modes of acquiring and of losing, or ceasing to possess, these two objects, the analogy between gain and loss would seem to indicate as our next task an inquiry into the various modes of distributing the losses to which owners of property are liable. Distributing loss.

The inquiry will be very brief. Suppose that an article has been destroyed, or damaged, or has gone astray, so that the loss has been already incurred. If the owner be ascertained, the burden of loss falls upon him. If he be unknown, no one bears it; so far as the whole world is concerned, it is as though no loss had been incurred at all. Now, ought the loss to be transferred to any person other than the owner; in other words, ought the owner, for one cause or other, to be awarded any *solatium*? That is a matter which will be discussed hereafter in the Penal Code; and I will here confine myself to a particular case by way of illustrating the general principle.

When the vendor and the purchaser of articles of merchandise are at a distance apart, the articles must needs pass through a greater or less number of intermediate hands. They may be carried by land, or by sea, or over inland waters; the goods may be destroyed, or damaged, or they may go astray. Suppose they do not reach their destination at all, or arrive in an unmarketable condition: upon whom should the loss fall—the buyer or the seller? Damage to goods in transit.

Damage to  
goods in  
transit—  
*cond.*

I say upon the seller, reserving his rights of recourse against intermediate agents. By the exercise of care on his part, the seller may contribute to the safety of the merchandise: it lies with him to choose the time of despatch and the mode of transport, as well as to take precautionary measures by obtaining bills of lading or other necessary documents. All this should be much easier of accomplishment by the merchant trained in commerce than by the individual who buys from him. So far as the purchaser is concerned, it is only by some accident that his efforts can contribute in any degree to bring affairs to a successful issue. The 'reason' of this decision is, then, 'Greater preventive power,' and the 'principle' upon which it is founded that of 'security.'

Special situations may establish the need of departing from this general rule and of making arrangements to meet the particular case. For an even more obvious reason, individuals may depart from it by agreements made between themselves. I do no more than indicate the principles: this is not the place to dwell on their application.

# PRINCIPLES OF THE CIVIL CODE.

## PART III.

### RIGHTS AND OBLIGATIONS ATTACHED TO VARIOUS PRIVATE CONDITIONS.

#### INTRODUCTION.

WE now proceed to consider in greater detail the several rights and obligations which the law should properly attach to the various conditions comprised in the domestic or private state.<sup>1</sup> These conditions may be reduced to four; namely, those of (α) Master and Servant; (β) Guardian and Ward; (γ) Parent and Child; and (δ) Husband and Wife.

If the natural or historical order of these relations were adopted, the last in the list would stand first; but, to avoid repetition, we have preferred to begin with the simplest. The rights and obligations of a father or a husband are a compound of those of a master and of those of a guardian: the two first-named conditions are elements of which the others are composed.

<sup>1</sup> In chap. xvii. of the *Vue Générale d'un Corps Complet de Législation* (*Traité*s, etc., vol. i., p. 294; see Bowring, vol. iii., p. 192) we find: 'Un état domestique ou civil n'est qu'une base idéale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacités.' This 'base idéale,' says Austin, is nothing but the fictitious quality (expressed in another shape) which, according to the scholastic jurists, forms the *status*. It is remarkable, he adds, that Bentham (who has cleared the moral sciences of loads of the like rubbish) adopts this occult quality under a different name. The supposition that a *status* is a quality inhering in the party who bears it, has every fault which can possibly belong to a figment. The supposed quality is merely fictitious; and, admitting the fiction, it will not serve to characterize the object, for the purpose of distinguishing which the fictitious quality was devised. *État* is really a collective name for the actual and possible rights and obligation of some given person, and for such incapacities and exemptions as he may lie under or enjoy (*Jurisprudence*, edition of 1911, vol. ii., p. 699). (C. M. A.)



## CHAPTER XXV.

### MASTER AND SERVANT.

Master and  
Servant.

SETTING aside the question of slavery, there is little to be said about the condition of 'Master,' and the correlative conditions arising in connection with the various kinds of 'Servants.' All these conditions are the result of bargains; and it is for the contracting parties to make such arrangements as suit their own convenience.<sup>1</sup>

Master and  
Apprentice.

The condition of 'master,' when considered in relation to that of an 'apprentice,' is a mixed condition; for the master is at once master and tutor (or guardian)—tutor as to the craft which he teaches, and master as to the service and profit that he secures.

The work done by an apprentice (after the time is reached when the produce of his labour exceeds in money value the total cost of his training and maintenance) constitutes the pay or reward of the master in respect of the trouble and expense already incurred by him.

This reward will, naturally, be greater or less according to the difficulty that the craft presents. Some crafts may be learned in seven days; while others might require an apprenticeship of as many years. The price to be paid

<sup>1</sup> According to the doctrine of 'common employment,' a servant, as an implied part of the contract of service, took upon himself, as between himself and his master, the natural risks and perils incident to the performance of his duties—in other words, it was held that these risks were considered in the fixing of the wages. This doctrine was, however, considerably modified by the Employers' Liability Act, 1880; and now, under the Workmen's Compensation Acts of 1897 and 1900, an employer of labour, in the absence of misconduct of a serious character, has been made a sort of 'insurer' of his workmen against accidents. (C. M. A.)

for these mutual services will be regulated readily enough by competition, as in the case of every other object of commerce; and here, as elsewhere, industry will find its due reward.

Governments, for the most part, have not adopted this system of free bargaining. They have sought to introduce into the various callings what they are pleased to call order: to substitute an artificial for a natural arrangement, so that they might have the gratification of regulating that which would perfectly well have regulated itself.

Interference by governments: evil influence thereof.

Intermeddling in matters of which they knew nothing, they were generally seized with a craze for applying uniform rules to objects of a widely different nature. For example, the ministers of Elizabeth fixed the same term of apprenticeship, seven years, alike for the simplest and for the most difficult crafts.<sup>1</sup>

This mania for making regulations is always disguised under some trivial pretext: a desire to perfect the arts, to get rid of unskilful workmen, to assure the credit and renown of national manufactures.<sup>2</sup> Yet, for the achievement of such objects, a very simple and natural expedient presents itself. That is, to leave everybody free to use his own judgment, to choose what is good, to reject what is bad, to let merit alone determine his preferences; and in this way, by unrestrained liberty of competition, to arouse a spirit of emulation in the breast of every artisan. But, not so: the public is to be deemed incapable of judging the quality of work, which *must*, it seems, be regarded as satisfactory provided that the workman has been engaged in his

<sup>1</sup> By statute 5 Eliz., c. 4, which was repealed by the Conspiracy and Protection of Property Act, 1875. Persons serving seven years to a trade had an exclusive right to exercise that trade; but following the trade seven years without any effectual prosecution (either as a master or a servant) was sufficient without actual apprenticeship. See, further, Blackstone, book i., c. 14. (C. M. A.)

<sup>2</sup> It was further urged that apprenticeships were useful to the commonwealth by preventing youths from being nourished in idleness, and that no one would undergo a seven years' servitude unless a monopoly were created. Cf. 11 Coke, 54. (C. M. A.)

trade for a given number of years. Thus, we should no longer ask an artisan whether he understands his business, but how long his apprenticeship lasted. If workmanship is really to be judged on its merits, it would be well to let everyone work at his own risk; and, if that were done, we should find that one man would be a master who had never been apprentice, while another would remain an apprentice all his life.

## CHAPTER XXVI.

### OF SLAVERY.

WHEN servitude assumes the form of a state or condition, and the obligation to remain in that state or condition (with respect to a certain master or others who derive title from him) embraces the whole life of the servant, that state or condition I call 'slavery.'

Slavery:  
Meaning  
thereof.

Slavery is susceptible of many modifications and alleviations, varying with the assessment of services to be exacted and of coercive measures to be employed. There was a vast difference in the position of a slave at Athens and at Lacedæmon; there is still more between that of a Russian serf and that of a negro slave in the colonies. But, whatever may be the limitations on the exercise of authority, if the obligation of service be unlimited in point of time, I still call it 'slavery.' In drawing the line of demarcation between freedom and slavery, we must stop somewhere, and this point seems the most conspicuous and the easiest to determine.

This distinction, dependent as it is on 'perpetuity,' is peculiarly significant; inasmuch as such perpetuity, wherever found, weakens, impairs, and renders of doubtful value, even the wisest precautions for mitigating the exercise of authority. Power, when unlimited in point of time, can hardly be restrained or limited in any wise. If, on the one hand, we consider the ease with which a master may, by slow degrees, make the yoke heavier; the rigour he may employ in exacting the services that are his due; how, under divers pretexts, he may enlarge his pretensions, and seek occasion

Difficulties  
in way of  
'mitiga-  
ting'  
slavery.



to torment a presumptuous servant who dares to refuse what he does not owe: if, on the other hand, we consider how difficult it is for a slave to claim or secure the protection of the law; how much more distressing his situation becomes after a public breach with his master; how greatly it is to his own interest to win the master's favour by grovelling submission rather than to enrage him by refusals—we shall readily perceive that a plan for mitigating slavery is a good deal easier to frame than to execute.

We shall see, too, that to prescribe with precision the services to be rendered is wholly insufficient to alleviate the lot of the slave; and that, even under laws most excellently contrived with this object, it is only the most flagrant breaches that will ever be punished, while the ordinary course of domestic rigour will scout and defy the tribunals. I do not suggest that we must, therefore, abandon slaves to the uncontrolled pleasure of their master; or that, because the protection of laws is inadequate, such protection ought not to be extended to them at all. But it was necessary to point out the evil inherent in the very nature of the institution—that is to say, the impossibility of subjecting the authority of a master over his slaves to legal restraint, so as to prevent him from abusing his power, should he be disposed to abuse it.

No man  
would  
willingly  
remain a  
slave.

That slavery is agreeable to the masters is a fact beyond the pale of doubt, seeing that they could, of their own motion, put a stop to it at any moment. That it is unacceptable to the slaves is a fact not less certain, inasmuch as they can nowhere be held in bondage save by compulsion. No man who is free would willingly become a slave: there never breathed a slave who did not yearn for freedom.

It is absurd to discuss human happiness except with reference to the wishes and sensations of mankind. It is idle to try to prove, by elaborate calculation, that a man ought to be happy when he is, in fact, miserable; or that a state into which no one is willing to enter, and from

which everyone is anxious to escape, is in itself a pleasant condition and one agreeable to human nature.

I can readily believe that the difference between freedom and slavery is not so great as it seems to some ardent and biassed minds. The habitual endurance of evil, and, in a still greater degree, ignorance of a more blissful state, serve to bridge over the chasm between two conditions which, at first sight, appear so far apart. However, all reasoning from probabilities as to the happiness of slaves is quite superfluous; for we have the most ample proof that, in point of fact, slavery is never embraced by choice, but, on the contrary, is ever an object of aversion.

This condition has been compared with that of a school-boy prolonged throughout life; and a great many people, it is said, declare that their days at school formed the period of their greatest happiness. The parallel holds good only in one particular. The circumstance common to the two conditions is subjection; but it is anything rather than this circumstance which makes the schoolboy happy. What renders him happy is a freshness of mind that lends the charm of novelty to all his impressions; lively and noisy games with comrades of his own age, contrasted with the staid solitude of his father's house. And, after all, how many scholars there are to be found who sigh for the hour when they will leave school for ever! Who among them would elect to remain there for the rest of his days?

However this may be, if slavery could be established on such a scale that there would be only one slave for each master, I might, perhaps, hesitate before pronouncing definitely as to the balance of advantage and disadvantage. It may be possible that, taking everything into account, the sum of good in such an arrangement might be almost equal to the sum of evil. But things cannot be so adjusted. As soon as slavery is established, it becomes the lot of the greater number. The masters count their slaves as they would their flocks and herds, by hundreds, thousands, tens

False analogy with condition of schoolboy.

One master, one slave.

Such an arrangement being impossible, slavery is necessarily an evil.

of thousands. The advantage is on the side of the one man, the disadvantages all on the side of the multitude. Though the mischief of servitude were not great in itself, its extent alone would serve to render it a very substantial evil. Speaking generally, and apart from every other consideration, there can, therefore, be no reason to hesitate in pronouncing the loss which the owners would sustain by emancipation as less than the gain which would result therefrom to the slaves.

Slaves  
produce  
less than  
free men.

Another very strong argument against slavery is drawn from its effect upon the wealth and power of a nation. A free man produces more than a slave. Suppose all the slaves of a master to be set at liberty, the man would undoubtedly lose a part of his property; but the slaves, in the aggregate, would produce not only what the master lost, but more still.

Now, happiness cannot fail to increase along with abundance, while the public weal grows in the like proportion.

Two circumstances conspire to lessen the productiveness of slaves: the absence of the stimulus of reward, and the insecurity of their condition. It is easy to understand that fear of the lash is not likely to extract from a workman all the exertion of which he is capable, all that he is worth. Fear disposes him rather to conceal his power than to exhibit it; to represent himself as below his true level rather than above it. By performing a work of supererogation, he would only prepare a rod for his own back: by displaying his real capacity, he would only increase the scope of his ordinary duties. In this way a sort of inverted ambition is created, and industry seeks to move backwards instead of pressing onward.

Slavery  
induces  
waste and  
neglect of  
master's  
interest.

Not only does the slave produce less, he consumes more; and this, not in outlay on enjoyments, but through waste, extravagance, and want of thrift. What cares he for interests which are not his own? Any toil that he can spare himself is for him a gain, pure and simple; while any



damage which he suffers to take place is a loss only to his master. Why should he contrive new expedients for doing more work or for doing it better ? To make improvements, one must think ; and thinking is a troublesome process in which no man engages without a motive. A human being, condemned to mere drudgery and degraded to the level of the brute creation, never rises above blind routine ; and generation follows generation without any mark of progress.

It is true that a master who understands his own interests will not dispute with his slaves some small gains accruing as the fruit of their industry. He knows well enough that their prosperity is his, and that to spur them on to labour he must offer them the bait of present reward. But such precarious favours, dependent on the disposition of the individual master, will not inspire the confidence which leads a man to form plans for the future, enables him to look upon his daily savings as the foundation of future wealth, and causes him to embrace posterity in his projects of fortune. Slaves perceive quite clearly that, if they became richer, they would be exposed to extortion, if not at the hands of the master, at any rate at the hands of his stewards and other subordinates, more grasping and more to be dreaded than the master himself. For the vast majority of slaves there is, then, no to-morrow : enjoyments capable of instant realization alone can tempt them. They become gluttonous, idle, and dissolute, without reckoning other vices which are engendered by their surroundings. Those who possess a little more foresight bury their paltry treasures. Without hope of compensation, or remedy for their ills, the dismal feeling of insecurity inseparable from their condition fosters in them every fault destructive of industry, and all the habits most mischievous to society. Nor is this some vain and abstract theory ; it is the result of actual experience in every clime and in every age.<sup>1</sup>

<sup>1</sup> 'Slavery in ancient and, doubtless, in all times was a hot-bed of vice and selfish indulgence, enervating the spirit and vital forces of



Suggestion  
that a slave  
is in same  
position as  
a day-  
labourer  
refuted.

But, it is said, so far as work is concerned, the free day-labourer in Europe is almost on the same footing as a slave. A man paid by the piece has, no doubt, an incentive in the shape of reward, and every effort that he makes receives its recompense: while he who is paid by the day has no motive other than fear of dismissal; whether he does little or much, he receives his wages for the day, there is no question of reward proportioned to services rendered. If he does less than a fair day's work, he may be dismissed, just as a slave, in the like case, may be flogged; neither is impelled otherwise than by fear, and neither has any share or interest in the produce of his labour.

In reply to this contention, three arguments may be advanced:

(a) It is not true that the day-labourer is without the motive of reward. The most skilful and industrious are better paid than their fellows; those who distinguish themselves find more regular employment, and are always chosen to perform the most lucrative tasks. We thus see that their exertions are really attended by substantial rewards.

(β) And, indeed, if the man's only motive were the penalty of dismissal, we should have a greater hold on the day-labourer than on the slave. The free workman has a feeling of honour, like the rest of us. In a free country, shame attaches to a reputation for idleness or want of skill; and as, in this regard, the eyes of his comrades are upon him as well as those of the master, the sanction of honour or public opinion is brought into play, on a vast number of occasions, by judges who are in no way concerned to let him off lightly. We thus see how free workmen exercise a sort of mutual inspection, and are sustained by a spirit of emulation. But in the case of slaves this sanction has much less force. The treatment to which they are subjected

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mankind, discouraging legitimate marriage, and enticing to promiscuous and barren concubinage' (Merivale's *History of the Romans under the Empire*, edition of 1868, vol. viii., p. 353). (C. M. A.)

renders them little sensible to a sanction so delicate as that of 'honour'; and, as the injustice of working without return for the advantage of somebody else cannot escape them, bondsmen feel no shame in avowing to each other repugnance to the toil which is their common lot.

(γ) Whatever presents itself to the day-labourer as a gain is an assured gain; everything he can earn is his own, and nobody has any right to touch it. But for the slave, as we have seen, there is no such thing as real security. No doubt it would be possible to cite exceptions. For example, some Russian noble, perhaps, has industrious serfs who possess several thousands of roubles, and enjoy their wealth just as their master enjoys his own property; but these are special cases which do not negative the ordinary rule. When we come to judge the effects of a general arrangement or disposition, we must do more than consider such rare and unusual cases.

In this brief account of the inconveniences of slavery, we have made no attempt to play upon the feelings or appeal to the imagination; we have not cast odium upon the masters as a body by generalizing from particular abuses of power. We have even refrained from speaking of the terrible means of rigour and constraint commonly employed in these domestic governments, without law, without any forms of process or appeal, without the safeguard of publicity. We might almost add, without any check; for, as we have seen, responsibility cannot be brought home to the master himself save in certain rare and extraordinary cases. Everything which savours of sentiment is at once denounced as exaggeration; and here the proofs of plain reason are so cogent as to stand in no need of any colouring calculated to excite suspicion. Slave owners, whom personal interest has not deprived of common-sense and common humanity, would acknowledge, without demur, the advantages of liberty over a state of servitude, and would themselves desire the abolition of slavery if it could be

Emancipation should be carried out without violence or casting unnecessary loss on masters.

achieved without destroying the fortunes of their class and without impairing their sense of personal security. The most powerful objection to any project of emancipation arises from the injustice and calamities which have attended hasty and ill-considered attempts to secure freedom. Such an operation could not be carried out suddenly except by means of a violent revolution, which, by disturbing all the persons concerned, upsetting everything, and putting everybody in a position other than that for which he was trained, would certainly produce evils a thousand times greater than any benefits which could possibly be expected to accrue.

Purchase of  
freedom  
out of pro-  
ceeds of  
labour.

Instead of rendering emancipation burthensome to the master, it ought, as far as may be, to be planned so as to work to his advantage; and the first expedient which obviously presents itself is the fixing of a price at which each slave would have the right to purchase his freedom. But there is a grave objection to the adoption of this expedient, inasmuch as the interests of the master would immediately come in conflict with those of his slaves. He would wish to hinder them from amassing such sums as would serve for their ransom: his policy would clearly be to keep them in a state of ignorance and poverty, to clip their wings as fast as they grew. This danger, however, arises simply from the fixing of a definite price: the right to purchase freedom on terms to be mutually agreed is not attended by any such inconvenience. The interest of the slave would counsel him to work his hardest that he might have as large a sum as possible to offer by way of inducement to his master; while the interest of the owner would lead him to allow his slave to amass riches rapidly, so that he might thereby secure a larger ransom.

Limitation  
of master's  
testamen-  
tary power.

A second expedient consists in limiting the power of testamentary disposition, so that, where there is no successor in the direct line, emancipation should follow as a matter of right. The hope of inheriting is always very



slight in the case of more remote kinsmen; and no such hope would exist at all when the law once became known. There would be no injustice done where no expectation was disappointed.

But we might, perhaps, go a step farther. At each change of ownership, even in direct successions, we might make some small sacrifice of property to liberty—for example, by freeing a tenth part of the slaves. An inheritance which has just fallen in does not present itself to the heir as of any fixed and determinate magnitude; and the loss of a tithe would scarcely be sensible. At such a time it would be less a loss than a deprivation of gain; and a tax of this kind in the interests of freedom might be made still heavier in the case of a nephew, who enjoys the hope of an additional succession from his father.

Freeing a part of the whole number of slaves on a change of ownership.

This offering to liberty ought to be determined by lot. A choice of those to be freed would, under the pretext of honouring the most deserving, become a source of intrigue and abuse; it would give rise to more jealousy and discontent than happiness. The drawing of lots is an impartial process: it gives everybody an equal chance of success, and diffuses the pleasure of hope even among those whom it does not favour; while the fear of being deprived of his chance, for any one of certain specified offences, would operate as an additional pledge for the fidelity of the slave.<sup>1</sup>

The emancipation ought to take place by families rather than by individuals. A father in bondage and his son free—a father set at liberty and his son still enslaved; what a

<sup>1</sup> This expedient might tempt slaves to resort to murder for the purpose of hastening their emancipation—a very serious objection to this proposal of a lottery. We must note, however, that the very uncertainty would lessen the danger, as few would be led to commit a crime from which it was by no means sure that they would reap any profit. But to eliminate this temptation altogether, it would suffice that no emancipation should follow where the master was poisoned or assassinated, whether by the hand of a slave or by the hand of some person unknown. This expedient for liberation would thus become a source of security for the master (Dumont).



piteous—nay, what a shocking—contrast! what an endless source of domestic grief!

There are, no doubt, other means of hastening this desirable consummation; but they can only be discovered by studying the special circumstances of each particular country.

Emancipation certain to come, and need excite no alarm.

Although the legislator cannot at a single blow sever the bonds of slavery, time by slow degrees will loose them asunder; and the march of freedom, if delayed, is none the less sure and steady. The whole progress of the human mind, of civilization, of public wealth, of commerce, leads step by step to the restoration of individual liberty. England and France were once what Russia, the Polish Provinces, and a part of Germany, are to-day.

Landowners ought not to feel alarm at the change. Those who possess the soil wield, over men who live by the sweat of their brow, a power which Nature herself has bestowed upon them. The fear that emancipated labourers, free to travel where they list, would forsake their native soil, and leave the land untilled, is a fear absolutely chimerical—especially if emancipation be brought about by slow degrees. Because it is found that a slave runs away when he gets the chance, it is concluded that a freedman would be even more likely to disappear. But the opposite conclusion would be far more just: the motive for flight no longer exists, while all the motives for remaining are strengthened.

We have seen certain landowners in Poland, with enlightened views as to their real interests, or perhaps animated by a desire for renown, effect a complete and simultaneous emancipation throughout their vast seignories. Has this generosity resulted in their ruin? Quite the contrary. The farmer, having an interest in his own labour, has found himself able to pay more than the slave; and lands cultivated by free hands acquire additional value year by year.

## CHAPTER XXVII.

### OF GUARDIAN AND WARD.

THE weakness of childhood demands constant protection. Everything has to be done for a being of imperfect growth, who can, as yet, do nothing for himself. The complete development of his physical powers takes many years; that of his intellectual faculties is still slower. A time comes when he is already possessed of strength and passions, but is without the experience necessary to regulate them. Very much alive to the impulses of the moment, and quite careless of the future, he must be restrained by some authority more direct than that of the laws; he must be controlled by rewards and punishments, not casual, but continuous, in their operation, which, during the process of education, may be adapted to his varying moods and actions.

Necessity  
for some  
authority  
over  
children  
more direct  
than that  
of the law.

So, too, when we come to the choice of a calling or profession, it again becomes imperative that the child should be made subject to some special authority. Such a choice must turn upon the personal situation, the expectations, the talents, the bent of mind, of the particular youth: upon the readiness with which these circumstances may be utilized in one direction rather than in another; in a word, upon the chances of success. The question is too complex for the decision of a public magistrate; every case requires special consideration, and its decision demands an acquaintance with detail such as no magistrate could ever possess.

This power of protection and control over individuals deemed incapable of protecting and controlling themselves

'Guardian-ship.'

constitutes 'Guardianship': a kind of domestic magistracy, founded on the manifest need of those made subject to it, and one which ought to be invested with all the authority necessary to attain its end, but no more.

The power necessary for the education of a ward is that of choosing his calling and fixing his habitation, together with the right to reprimand and correct, without which the authority of the guardian would be of none effect. But the exercise of such a right may be the more readily reduced in severity, inasmuch as its application may be certain, direct, and easily varied, while this form of domestic government, moreover, has at its disposal an inexhaustible store of rewards; for, at an age when everything is received from the hands of another, there is no act or concession which may not be made to assume the shape of reward.

Provision  
of subsist-  
ence for the  
ward.

As to the subsistence of the ward, it can be derived from three sources only: property that he possesses in his own right, gratuitous donations, or the work of his own hands. If the ward has property of his own, it is administered in his name and for his benefit by his guardian; and everything that is done in accordance with prescribed forms is ratified by the law. If the ward has no property, he is maintained either at the expense of his guardian—as in the case most common of all, where guardianship is exercised by the child's father or mother—or at the charges of some charitable institution; or, lastly, by his own labour, as in a case where he is bound apprentice on such terms that the period of non-value is made up for by valuable services rendered at a later period of the apprenticeship.

Father and  
mother are  
natural  
guardians.

Guardianship being an office altogether burthensome, its duties are cast upon those who are most inclined to discharge them and enjoy the greatest facilities for doing so. The father and the mother, of course, occupy this position before all other persons. Natural affection would dispose them to the office with even greater force than the law; but the law which imposes it upon them is by no means

useless. It is because children have been found abandoned by the authors of their being that such abandonment has been made a punishable offence.

If a dying father nominates a guardian for his children, it is presumed that no one could know better than he who would be likely to have the means and the inclination to take his place in regard to them; so that his choice should be approved unless there exist very strong reasons to the contrary.

If the father has made no appointment, the duty should be cast upon some kinsman, who would be drawn by interest to preserve the family property, and by honour and affection to see to the welfare and education of the children. In default of kinsmen, the choice should fall on some friend of the orphans, who would undertake the office voluntarily, or on some public official specially appointed.

Regard must also be had to circumstances which should release a particular person from the burthen of guardianship; as, for example, advanced age, the care of a large family, natural infirmities, or reasons of prudence or delicacy, such as a conflict or complication of interests.

Dispensations from burthen of office of guardianship.

Special precautions against any abuse of this office are to be found in the provisions of penal law: an abuse of authority as respects the person of the ward is referable to the class of personal injuries; illicit gains derived from his fortune, to the class of fraudulent acquisitions, etc. The only matter to be specially considered is the circumstance peculiar to such an offence—namely, the *breach of trust*. But, although this renders the offence more odious, it is not always a ground for increasing the punishment; on the contrary, we shall see elsewhere that it is often a reason for diminishing it, the position of the offender being such that the discovery of a crime is easier, while reparation is more readily made, and the alarm not so great. In the case of seduction, this species of relationship adds to the enormity of the offence.

Particular precautions against abuse of power.



Precautions for protection of Wards.

As to precautions of a general character, we may add that guardianship has often been severed; the care of the fortune being assigned to the next heir, who in that quality has the greatest interest in maintaining and improving the estate, while the custody of the ward's person has been granted to some other kinsman more interested in the preservation of the child's life.

Legislators have on occasion taken further precautions—as, for example, by forbidding guardians to buy the property of their wards, or by permitting wards, within a certain period after attaining their majority, to resume the ownership of lands sold by their guardians. The first of these two expedients would not seem subject to much inconvenience; but the second must injuriously affect the interests of the ward by depreciating the value of his estate. It is plain that the property would be worth less to a purchaser if his possession were precarious, and if he were afraid to undertake improvements which might result to his disadvantage, by supplying an additional motive for a resumption of ownership. Both expedients would appear useless if any sale of the property was bound to take place in public and under the supervision of a magistrate.

The simplest plan is to allow anyone to act as next friend of the child in legal process against his guardian, whether for malversation of funds, violence, or neglect. In this way the law puts under the protection of every generous soul these young people who are not, as yet, strong enough to protect themselves.

Wardship, being a condition of dependence, is an evil to which we should put an end so soon as there is no danger of its cessation producing a greater evil. But what age ought we to fix for emancipation? In this matter we can only be guided by general presumptions. The law of England has fixed the period at the age of twenty-one years. This seems far more reasonable than the Roman law, which prolonged the period of tutelage to the age of twenty-five

Age at which tutelage should cease.

years, and has in this respect been followed throughout the greater part of Europe. At the age of twenty-one years the faculties of a man are developed; he is fully sensible of his strength and capacity; he yields to counsel what he refuses to authority, and will no longer suffer himself to be held in leading-strings. The result is that any extension of such domestic authority would often give rise to a condition of irritation and bitterness injurious alike to both the parties concerned. There are, however, some youths who are, so to speak, incapable of reaching the maturity of manhood, or who attain it much later than their fellows. Such cases may be provided for by 'interdiction,' which is merely a prolongation of the period of tutelage.

## CHAPTER XXVIII.

### OF FATHER AND CHILD.

Father is  
both Mas-  
ter and  
Guardian.

It has already been pointed out that a father is in some respects the master, in others the guardian, of his child. In his quality of master he will have a right to impose tasks on his children, and to make use of their labour for his own benefit, until the age at which the law confers on them a status of independence. This right granted to the father serves as an indemnity or return for the trouble and expense incurred in the children's nurture and education. It is, assuredly, an excellent thing for a father to take interest and pleasure in the education of his child; and the joy that he feels in training his offspring is really a gain to both of them. In his quality of guardian he enjoys all the rights, and lies under all the obligations, of which mention has been made in the last chapter.

Under the first relation we consider the benefit of the father, under the second that of the child. The two qualities are reconciled readily enough in the person of a father, by reason of his natural affection, which constrains him to make great sacrifices for his children rather than to abuse his rights for selfish purposes.

It might seem, at the first blush, that the legislator need not interpose at all between a father and his children, that he might safely rely on the tenderness of the parent and the gratitude of the offspring. But this view is superficial and mistaken. It is absolutely necessary on the one hand to limit the paternal power, and on the other to assure and sustain filial respect by legal enactment.

*General Rule.*—We should not confer any power by the exercise of which the child would lose more than his parent would gain. This rule was not observed in Prussia when, following the Roman precedent, a father was granted the right of preventing the marriage of his son without any limitation of age. So far as paternal authority is concerned, political writers have rushed to opposite extremes: some have sought to render it despotic, as among the Romans, while others have sought to destroy it altogether. Certain philosophers, again, have held that children ought not to be left to the caprice and ignorance of parents; that the State ought to take them in hand and rear them in common. In support of such a scheme, they cite to us the examples of Sparta and Crete, and of the ancient Persians; but they forget that this common education was always confined to a small class of citizens, the bulk of the population being in a state of slavery.

Limitation  
of Father's  
rights.

Proposal  
for educa-  
tion in  
common.

Under any such artificial arrangement there would, of course, arise difficulty in distributing the cost and in throwing the burden of heavy charges upon parents, who no longer continued to reap, in return, any direct advantage, and had ceased to be influenced by the motive of tenderness for their children, now become almost strangers to them. But, beyond all this, there will arise a more serious inconvenience, in that the pupils will not, at the proper time, receive such an education as would fit them to fill the particular positions to which their diverse and varied conditions in life will afterwards call them.

Objections  
to such a  
scheme.

The very choice of a profession or calling depends on such a variety of circumstances that it should be made by none other than the parent: he alone can properly decide upon the careers best suited to the young people, and most in conformity with their expectations, talents, and inclinations. Besides, this plan, in which the reciprocal affection between parent and child is to count for nothing, would have the most baneful effect possible in destroying family



Education  
in common  
—*contd.*

ties, weakening the bonds of wedlock, and depriving fathers and mothers of the delight they find in seeing the younger generation growing up around them. Would they busy themselves with the same zeal to promote the future welfare of children who could no longer be regarded as really their own? Would they still be inspired by sentiments which they could never hope to find reciprocated? Would industry, no longer spurred by paternal affection, remain as active as ever? Would not the enjoyments of the home assume a character less advantageous to general prosperity?

As a last argument, I will add that the natural arrangement, which leaves with the parent the choice, the mode, and the burden of education, may be likened to a series of experiments, having as their object the perfecting of a general system of education. In every direction progress is advanced and developed through the emulation of individual parents, by the differences in their minds and notions—in a word, by the variety of particular impulses promoting the general movement. But if all were cast in the same mould, and instruction were imparted everywhere under State authority, errors would be stereotyped, and no progress would be made.

This is, perhaps, giving too much importance to so chimerical an idea; but Plato's notion has seduced certain famous authors of our own time, and an error which has led Rousseau and Helvétius astray may well find others to embrace it.

## CHAPTER XXIX.

### OF MARRIAGE.

'Inde casas postquam, ac pelles ignemque pararunt,  
Et mulier conjuncta viro concessit in unum,  
Castaque privata veneris, connubia læta  
Cognita sunt, prolemque ex se videre creatam,  
Tum genus humanum primum mollescere cœpit.'

LUCRETIVS, V. 1109.

FROM whatever point of view we regard the institution of marriage, we cannot fail to be struck by the utility of that excellent arrangement; the bond that holds society together; the very groundwork of our civilization. Marriage, considered as a contract, has freed woman from the most cruel and humiliating servitude; it has segregated the aggregate community and formed distinct families; it has given rise to a sort of domestic magistracy; it has created the citizen; it has multiplied social sympathies; and, by virtue of their affection for the rising generation, it has extended the outlook of mankind so as to embrace the future. To realize its benefits to the full, we need only picture the world as it would be without the institution.

Utility of  
the  
Marriage  
Contract.

The questions arising on this contrast may be reduced to seven: (1) Between what persons shall it be permitted? (2) What shall be its duration? (3) Upon what terms shall it be entered into? (4) At what age? (5) At whose choice? (6) Between how many persons? (7) With what formalities?

#### § 1. *Between what Persons shall Marriage be permitted?*

If we are to be guided on this point by the teachings of history, we shall find ourselves in a position of great em-

Between  
what  
persons?

barrassment; nay, it would be impossible to deduce any single determinate rule from so many conflicting usages. There is no lack of respectable precedent to sanction unions which we regard as highly criminal, or to prohibit many others which we hold to be altogether harmless. In this matter, every nation pretends to follow what it is pleased to call the law of Nature; while anything, which does not happen to accord with the matrimonial laws of their particular country, men look upon with a kind of horror, accounting it impure and unclean. Let us suppose ourselves in complete ignorance of every one of these local institutions; let us consult only the Principle of Utility, and see between what persons it is proper to permit this union, and between whom it should be forbidden.

Intermar-  
riage of  
relatives.

If we examine a family interior, composed of persons differing in age, sex, and relative duties, strong reasons for prohibiting alliances between various members of the family will at once present themselves to the mind.

I see one reason which might be urged as applying to any such contract of marriage at all. A father, a grandfather, or an uncle occupying the father's position, might abuse his power by forcing a young girl to contract with him an alliance which would be hateful to her. The greater the necessity for conferring authority on such relatives, the less should be the temptation leading to its abuse.

But this inconvenience extends only to a small number of the class of cases known as 'incestuous,' and it is far from being the most grave. If we would seek the real reasons for proscribing certain alliances, we shall find them in the risk of a corruption of manners—that is to say, in the mischiefs which might result from casual and illicit intercourse.

If some insurmountable barrier were not erected between near relations fated to live together in the closest intimacy, the frequency of their contact, the many opportunities that offer, their very affection and innocent caresses, might

kindle a fatal passion. The family—that retreat wherein repose should be found in the bosom of order, and the soul, disturbed by the bustle of the outer world, should be at rest—the family, I say, would itself become a prey to all the turbulence of rivalry, all the fires of love. Pangs of jealousy would banish confidence; the tenderest sentiments of the heart would be destroyed; eternal hate, or bitter feelings of revenge, of which the bare idea makes one tremble, would fill their place. Our belief in the chastity of young girls, which is so powerful an incentive to marriage, would rest no longer on solid foundation; while the most dangerous snares in the young man's path would be spread in the very nursery where he was least able to escape them.

These inconveniences may be ranged under four heads:

(*a*) *Evil of Rivalry*.—Danger resulting from a real or supposed rivalry between a married man and certain of his kinsmen and connections.

(*β*) *Hindrance to Marriage*.—Danger of depriving a young woman of the chance of forming a permanent and advantageous establishment in the way of marriage, by lessening the feeling of confident security in the minds of those who might wish to marry her.

(*γ*) *Relaxation of Domestic Discipline*.—Danger of upsetting the nature of the relations subsisting between those who ought to command and those who ought to obey; or, at any rate, of weakening the tutelary authority which, in the interest of minors, should be exercised over them by the heads of the family or by those who occupy their place.

(*δ*) *Physical Injury*.—Danger to the development of health and strength, such as might result from premature indulgence.

#### *Table of Alliances to be prohibited.*

A man shall not marry—

1. The wife or widow of his father, or of any other pro-  
genitor. *Inconveniences* (*a*), (*γ*), (*δ*). Prohibited Alliances.



2. Any descendant. *Inconveniences* ( $\beta$ ), ( $\gamma$ ), ( $\delta$ ).
3. His aunt. *Inconveniences* ( $\beta$ ), ( $\gamma$ ), ( $\delta$ ).
4. The wife or widow of his uncle. *Inconveniences* ( $\alpha$ ), ( $\gamma$ ), ( $\delta$ ).
5. His niece. *Inconveniences* ( $\beta$ ), ( $\gamma$ ), ( $\delta$ ).
6. His sister. *Inconveniences* ( $\beta$ ), ( $\delta$ ).
7. Any descendant of his wife. *Inconveniences* ( $\alpha$ ), ( $\beta$ ), ( $\gamma$ ), ( $\delta$ ).
8. His wife's mother. *Inconvenience* ( $\alpha$ ).
9. The wife or widow of any descendant. *Inconvenience* ( $\alpha$ ).
10. The daughter of his father's wife by a former husband, or of his mother's husband by a former wife. *Inconveniences* ( $\beta$ ), ( $\delta$ ).

In the text of the law it would be necessary, for greater clearness, to insert a corresponding table of alliances forbidden to the woman: it would here be useless repetition.

Should a man be permitted to marry his deceased wife's sister ?

There are reasons 'pro' and 'con.' The reason against permitting such an alliance is the risk of rivalry during the joint lives of the two sisters. The reason in favour of it is the advantage to the children of the marriage. If their mother chance to die, what good fortune for them to have their own aunt as stepmother ! What could be more likely to temper the natural hostility to such a connection than a blood relationship so close as this ? The latter reason seems to me to carry more weight than the former. But, to obviate the risk of rivalry, the wife ought to possess legal power to forbid her sister the house. If the wife does not desire the society of her own sister, what valid ground can the husband have for granting admission to the stranger ?

Should a man be permitted to marry his brother's widow ?

There are reasons 'pro' and 'con,' as in the preceding

Marriage  
with de-  
ceased  
wife's  
sister.

Marriage  
with de-  
ceased  
brother's  
widow.

case. The reason against permitting such an alliance is, again, the risk of rivalry; the reason in favour of it is, again, the advantage to the children. But these reasons seem to me to be of little cogency on either side.

My brother has no more authority over my wife than a stranger, and, indeed, can only see her with my permission. In truth, the risk of rivalry appears less great than in the case of other men. The reason *against* is thus reduced almost to nothing. On the other hand, children have very little to fear from a father-in-law. It is a marvel if a step-mother be not the enemy of the children of the first marriage; but a stepfather is commonly their friend, their second guardian. The difference in condition of the two sexes—the legal subjection of the one, the legal sway of the other—renders them liable to different defects in character which produce opposite effects. The uncle is already the natural friend of his nephews and nieces; they have nothing to gain in that respect by his becoming the husband of their mother. If they find an enemy in a stepfather who is not akin to them, it is to their uncle they resort for protection. If the stepfather prove a friend to them, they secure in him a second protector—one more than they would have had if their uncle had occupied the position of stepfather. The reasons *for* and *against* being of little cogency either way, it would seem that the *primâ facie* advantage of freedom over restriction should incline the balance in favour of permitting such alliances.

Instead of weighing the reasons which I have presented for prohibiting marriages within a certain degree of relationship, the morals of the ‘man in the street’ settle these legislative questions offhand, without taking the trouble to investigate them. ‘Nature,’ it is said, ‘abhors such alliances: we must therefore forbid them.’

Arguments  
based on  
natural  
Repug-  
nance.

Now, in sound logic, this suggestion could never supply a satisfactory reason for prohibiting any action whatsoever. Where such repugnance actually exists, the law is useless.

Why forbid what nobody wishes to do? The natural repugnance should serve as a ban. But if there is, in point of fact, no repugnance, the reason for prohibition goes by the board; everyday morality would have nothing further left to urge for prohibiting the act in question, seeing that the whole argument, based on natural disgust, is destroyed by this contrary assumption. If everything is to be referred to Nature—that is, to the promptings of desire—we must conform with all her decisions, whatever they may be. If marriages which she abhors are to be forbidden, those with which she is well pleased must be allowed. Nature deserves no more respect when she hates than when she loves and desires.

It is seldom that the passion of love is developed within the circle of persons whom it is expedient to exclude from the privilege of intermarriage. To give birth to this sentiment, there is need of some measure of surprise, some sudden impression of novelty; and it is this which the poets have happily expressed by the ingenious allegory of the arrows, quiver, and blindfold eyes, of Cupid. Individuals accustomed to each other's society from an age when desire can be neither felt nor inspired will see each other with the same eyes until the end of their days; there is no reason why the passion of love should be excited at any one period rather than at any other. Their affections have taken another direction, like a river which has hollowed out its bed, and no longer changes its course.

In this matter, then, Nature accords well enough with the Principle of Utility; but it would never do to put one's trust in Nature alone. There are circumstances in which passion might be inflamed, and such an alliance become an object of desire, were it not forbidden by positive laws and branded by public opinion.

Historical  
instances of  
incestuous  
marriages.

In Egypt, under the Grecian dynasty, it was common for the heir to the throne to espouse one of his sisters. This was, apparently, done with the view of avoiding the

dangers of an alliance with the family of a subject or with the family of a foreigner. In that elevated rank, such marriages might possibly be exempt from certain inconveniences which would attach to them in private life: royal opulence admits a degree of separation and seclusion in early life which could not be maintained in ordinary circles.

Political considerations have led to somewhat similar instances in modern times. In our own day, the kingdom of Portugal has closely approached the Egyptian precedent. The reigning Queen has had as her husband her nephew and subject. But, to efface the stain of incest, princes and great folk are able to apply to an experienced chemist, who changes at will the colour of certain actions. Protestants, to whom this laboratory is closed, do not enjoy the privilege of marrying their aunts, though the Lutherans have supplied instances of a similar extension of liberty.

The inconvenience of these alliances is not felt by the persons who contract them; it lies wholly in the evil of the example. Permission granted to particular persons makes the prohibition seem to other people an act of tyranny; when the yoke is not borne by all alike, it appears heavier to those who have to bear it.

It has been said that these marriages between blood relations cause the race to degenerate, and that cross-breeding is as necessary for men as for animals. The objection would, doubtless, have some force if it were likely that, in the absence of legal restraints, marriages between persons closely akin would become the most common type. But it is enough to discard bad reasons; and even that would be too much, if it were not of real service to a good cause to get rid of any feeble and fallacious argument by which it is sought to sustain it. Some well-meaning folk hold the view that we ought not to take away from good morals any one of its supports, even though it be one resting upon falsehood. Their mistake resembles that of the devotees who have sought to serve religion by the use

Need for  
Cross-  
breeding.



of pious frauds. Instead of strengthening their cause thereby, they have weakened it by exposing it to the derision of its adversaries. When a bad mind triumphs over a false argument, it is acclaimed as a triumph over morality itself.

§ 2. *For what Period? An Inquiry as to Divorce.*

For what period should a marriage endure?

If the law were silent as to the duration of the marriage contract, and people were free to form this engagement for a longer or shorter term, as in the case of a lease, what, under the auspices of such liberty, would be the most usual arrangement? Do you suppose there would be a wide departure from the practices that now prevail?<sup>1</sup>

Reasons for union extending throughout joint lives of parties.

A man's object in entering into the contract might be merely to satisfy a transient passion; and that passion satisfied, he would have enjoyed all the advantage he had hoped from the union without having incurred any of its inconveniences. But with the woman it is very different: the engagement has for her lasting and burthensome consequences. After the pains of pregnancy, after the perils of childbirth, she is charged with the cares of motherhood.

<sup>1</sup> In 1909 a Royal Commission on Divorce and Matrimonial Causes was appointed. 'Majority' and 'Minority' Reports were published after the lapse of some three years; but so far no action has been taken in the matter. Both reports agree that greater facilities for procuring divorce should be afforded to the poorer classes. They agree, too, that *nullity* of marriage should be decreed where it is sought on the ground of (α) unsoundness of mind at the time of the marriage and unknown to the other party; (β) epilepsy and recurrent insanity under similar conditions; (γ) undisclosed venereal disease; (δ) undisclosed pregnancy at date of marriage owing to intercourse with a man other than the husband; (ε) wilful refusal to consummate the marriage. They further agree that, in certain circumstances, the Court should be empowered to *presume the death* of one of the parties, and so enable the other party to contract a valid marriage. But, while agreeing that the law should be amended so as to place the two sexes on an *equal footing* as regards the grounds on which divorce may be obtained, the Commissioners who signed the Minority Report emphatically refused to acquiesce in the proposals formulated by the Majority for *extending the grounds* for divorce, by adding to 'adultery' (1) desertion for three years; (2) cruelty; (3) incurable insanity after five years' confinement; (4) habitual drunkenness, found incurable after three years' separation; or (5) imprisonment under a commuted death sentence. (C. M. A.)

Hence, a union which may afford the man nothing but pleasure may for the woman be the beginning of a long train of suffering, ending in death; unless, indeed, she can beforehand make sure of the protection and kind offices of her husband, not only for herself, but also for the embryo she nourishes in her womb. 'I give myself to you,' says she, 'but you must guard and shield me in my weakness, and provide for the safety and welfare of the fruits of our mutual love.' And herein we see the origin of a communion which might persist for many years, even though we were to assume that there was only a single child; but successive births form further ties, and as time goes on the contractual engagement is necessarily prolonged. The limits which we might, perhaps, have assigned in the first instance soon disappear; and there opens out before the pair a lasting career of common pleasures and reciprocal duties.

Marriage —  
contd.

When the mother can no longer hope to bear children, and the father has supplied the wants of even the youngest member of his family, are we to suppose that the contract will be dissolved? After a partnership of such long standing, will the parties think of separating? Has not habit wound round their hearts a thousand ties that death alone can sever? Will not the children form a new bond of union, and create a new source of pleasure and of hope? Will not they render the father and mother indispensable to each other through the cares and delights of a common affection such as parents alone can share? In the ordinary course, conjugal communion would, therefore, be maintained during the joint lives of the parties; and if it be natural to assume, in woman, prudence enough to insist on such a stipulation in the interest of all that is most dear to her, can we suppose that a father or guardian of, presumably, riper experience would be content with less?

The woman has, moreover, a further and peculiar interest in securing the indefinite duration of the union.

Time, pregnancy, the suckling of her offspring, cohabitation itself—all conspire to diminish the effect of her charms; and she must expect to see her beauty waning at an age when the vigour of man has not yet ceased to wax. She knows that, having exhausted the attractions of youth with one husband, she would with difficulty find a second; while her spouse would experience no similar difficulty. So that prudence would suggest to her a further clause in the marriage articles: ‘If I give myself to you, you shall not be free to leave me without my consent.’ The man, in turn, exacts a like promise; and so on both sides we have a contract binding in law and based on the happiness of the contracting parties.

Marriage for life is, therefore, most conformable to the dictates of Nature, best suited to the needs and circumstances of the family, and, for the generality of mankind, most favourable to the individual. Even if it were not ordained by positive law—that is to say, if it were subject to no laws other than those which sanction contracts in general—this arrangement would always be the most usual, because it is the one best adapted to the reciprocal interests of the contracting parties. Love on the part of the man, love and prudence on the part of the woman, the enlightened foresight and the affection of the pair in their capacity as parents, all conspire to impress the character of perpetuity upon this contractual alliance.

Should  
divorce be  
allowed?

But what should we think if the woman were to add this clause: ‘It shall not be lawful for us to part, though we should grow to hate as much as we now love each other.’ Such a term would seem the height of folly; there is something about it contradictory and absurd which repels at the first glance. Everybody would concur in condemning the rashness of any undertaking of the kind, and in holding that the promptings of humanity demanded its omission. But it is not the woman who seeks this cruel and stupid clause, nor yet the man who prays for its insertion: the



Law herself imposes it on both as a term from which there shall be no escape. The Law steps in between the contracting parties, and surprises them in the first transports of blissful youth, at a moment which presents an alluring prospect of future happiness. She says to them: 'You engage in these rites with every hope of coming joy; but, be warned by me, you are entering a prison whose gates will never open for your release. I shall be inexorable to your cries of woe; and though you dash yourselves against your irons, I will never suffer those fetters to be unloosed.'

To believe in the perfection of a beloved object, to believe in the eternity of passion felt and inspired, is an illusion we may well pardon in a couple of children blinded by love. But the sages of the law, the greybeards of Parliament, should not have harboured such fantastic notions. If they really believed in this eternity of passion, why forbid a step which nobody would even wish to take? But no! they foresaw inconstancy, they foresaw hatred; they foresaw that the most ardent love may be succeeded by violent aversion; and it was with heartless indifference that they pronounced the marriage vow to be eternal, even when the passion that prompted it had been swept away by sentiments of an entirely opposite character. If there were a law which allowed the taking of a partner, a guardian, a steward, a companion, only on condition that one never parted with him, everybody would cry: 'What tyranny! What madness!'

Some  
reasons for  
permitting  
Divorce.

Now, a husband is at once partner, guardian, steward, companion, and something more than all of them combined: yet in most civilized countries no husband can be had except for life.

To live at all times under the sway of a man one loathes is nothing less than slavery: to be forced to receive his embraces is misery too great to be borne even by a slave. It is idle to urge that the yoke is reciprocal—that does but double the misery.



Reasons for  
Divorce—  
*contd.*

Since marriage offers to the ordinary run of men the only means of fully satisfying the imperious desires of love, to deter them from marriage is to rob them of love's joys, and so produce evil commensurate with the degree of deprivation. And what more terrible bugbear could one find to scare them than the indissolubility of such a contract? A prohibition against leaving serves as a deterrent against coming in—and this holds good of a marriage, a service, a country, a condition or status of any kind whatsoever.

We need, perhaps, do no more than hint at the fact that the number of acts of infidelity will vary inversely with the number of marriage contracts: the greater the number of seducers in the field, the greater will be the number of seductions.

And, lastly, when death affords the only mode of deliverance, how terrible are the temptations that arise! what crimes may not be bred in such a situation! The cases that remain undiscovered are, perhaps, more numerous than those which come to light; while the case that will occur most frequently is some sin of omission, some offence of a 'negative' character.

Even when the heart is in nowise corrupt, how easy is it to fall into crime that can be committed by mere inaction! Given a detested wife and a beloved mistress exposed to the like peril: will efforts as brave, as whole-hearted, be made for the one as for the other?

But we must not conceal from ourselves that there are plausible objections against the dissolubility of marriages. Let us try to collate and answer them.

Objections  
to dissolu-  
bility of  
marriage  
contract.

Sense of in-  
security.

FIRST OBJECTION.—If divorce be allowed, the lot of neither party will be regarded as irrevocably fixed. The husband will look around him to find some woman more suited to his taste; while the wife, in like manner, will institute comparisons and make plans for changing her spouse. Hence there would result constant and reciprocal insecurity as to a form of property which is very precious, seeing that the whole scheme of life is framed with relation to it.

ANSWER.—(a) To some extent and under other names the same inconvenience attaches during an indissoluble marriage whenever, as is here assumed, all mutual love is stifled. In that case it is not a new wife that is sought, but a mistress; it is not a second husband, but a paramour. The rigorous duties of matrimony and its prohibitions, but too easy to evade, tend, perhaps, rather to promote inconstancy than to prevent it. It is well known that prohibition and constraint serve to stimulate the passions. Has it not been proved from experience that, by seizing on the imagination and constantly directing the mind towards a single object, the sight of obstacles serves to strengthen the desire to surmount them? The reign of liberty would beget fewer wandering fancies than the dominion of conjugal captivity. Make marriages dissoluble, and there will be more seeming separations, but not so many real ones.

(β) We ought not to confine ourselves to a consideration of the inconveniences: we should have regard also to the attendant advantages. Each of the parties, realizing what might be lost by dissolution, would continue to cultivate such arts of pleasing as, at the outset, induced reciprocal affection. Each of them would be more assiduous to study and to humour the feelings and disposition of the other. Each would grasp the necessity for making some sacrifice of personal inclination and self-love. In a word, care, complaisance, and devotion, would persist after marriage; and what was once exerted to engender love would now be practised to preserve it.

(γ) Young people of marriageable age would less often be immolated by their parents on the altar of avarice and greed. It would then be found necessary to give heed to natural desires and inclinations before forming ties which aversion could so speedily sever. The real harmony on which happiness reposes—that is to say, correspondence in age, taste, and education—would then enter into the calculations of prudence. It would no longer be possible to

marry the property without marrying the person, as the old saying goes. Before the foundations were laid, a careful examination would be made to ascertain whether they promised to prove durable.

Disregard  
of each  
other's  
interests.

SECOND OBJECTION.—Each contracting party, regarding the connection as transitory, would have little or no concern for the interests—in particular the pecuniary interests—of the other. Hence would arise profusion, neglect, and bad management of every kind.

ANSWER.—The same risk is run in the partnerships of commerce, and yet the danger is hardly ever realized. Moreover, in the case of a dissoluble marriage there exists a tie which does not bind business partners, the strongest and most enduring of all moral ties:—an affection for their common children, cementing the reciprocal affection of the spouses.

Such bad management is, indeed, more frequently found in the case of an indissoluble alliance than in the conduct of affairs by a commercial firm. Why is this? It is a result of indifference or dislike, which often engenders in married folk, who have grown tired of each other, an unceasing craving to escape from their surroundings and seek fresh attractions. The moral tie of common affection for their offspring is weakened or dissolved; the education—nay, even the welfare—of the children becomes scarcely a secondary object; the delights of their mutual devotion are gone for ever; each partner, in pursuit of separate pleasures, grows quite heedless of the future. This fundamental discord between the spouses soon occasions, in their domestic affairs, neglect and disorder in a thousand directions; so that the ruin of their fortunes is often an immediate consequence of the estrangement of their hearts. If the rule of liberty prevailed, this evil would not exist: before such disunion of their interests could occur, mutual disgust would have separated their persons.

Facility of divorce tends, indeed, to check rather than

to give birth to prodigality. Such facility inspires a dread of affording some substantial ground of dissatisfaction to a partner whose goodwill it is so essential to cultivate. Economy, which the interested prudence of the pair will always apprise at its full value, is of sufficient importance in their eyes to cover a multitude of faults; and for its sake many a wrong is forgiven. It must, too, be obvious that, in the event of divorce, if one of two spouses had gained a reputation for misconduct and extravagance, such an one would have much less chance of contracting another and more advantageous alliance.

THIRD OBJECTION.—Dissolubility of the marriage bonds would implant in the stronger of the contracting parties an inclination to maltreat the weaker, so as to force consent to the divorcement.

Tendency to bring about Divorce by maltreatment.

ANSWER.—This objection is grave, and deserves serious attention at the hands of the legislator. Happily, a single precaution will enable us greatly to reduce this risk. In case of ill-treatment, let liberty to marry again be bestowed on the party maltreated, but not on the other party. If this course were adopted, the more anxious the husband might be to obtain divorce for the purpose of marrying again, the greater would be his fear of behaving ill towards his wife, lest any acts on his part should be construed as cruelties intended to force her consent. Rough and brutal modes of inducing a separation being thus ruled out, there would remain only methods of allurements. If he has the means, he will seduce her by the offer of an independent fortune; or he may, perhaps, cast about to find her another spouse whom he can prevail upon her to accept as the price of his ransom.

FOURTH OBJECTION.—This objection rests on the interests of the children of the marriage: what would become of them if the law dissolved the union between father and mother?

Detrimental to interests of Children.

ANSWER.—Their fate would be the same as if the union



had been dissolved by death: but, in case of divorce, the disadvantage to them is not so great. The children may continue to live with the parent whose care and attention is most necessary to them; for the law, consulting their interest, will not fail to confide the boys to the father, and the girls to the mother. The great risk which children run after the death of a parent is that of coming under the control of some stepfather or stepmother who looks upon them with unfriendly eyes. Girls in particular are exposed to most harassing treatment under the habitual despotism of a cruel stepmother. But, in case of divorce, this risk is not incurred. The boys will be under the control of their father, the girls under that of their mother. Their education will suffer less than it would have suffered from domestic strife and enmity. If, then, the interests of the issue of the marriage provide adequate ground for prohibiting a second union in case of divorce, they afford an even stronger reason for prohibiting such a union in the event of death.

General  
observations.

In conclusion, a severance of the marriage tie is an act of sufficient importance to be subject to formalities which will, at least, have the effect of counteracting caprice and of allowing the two parties some time for reflection. The intervention of a magistrate is necessary, not only to make sure that there has been no undue pressure on the husband's part to force his wife's consent, but also to interpose delay, more or less lengthy, between the demand for divorce and the decree by which it is obtained.

Dissolution of marriage is one of those questions upon which opinions will always be divided. Everyone is inclined to approve or condemn divorce according to the amount of good or evil which he sees result in particular cases, or according to the dictates of his own personal interest.

In England, dissolution can take place only when adultery on the part of the wife is proved. But it is necessary

to pass through several courts; and as an Act of Parliament on this subject costs at least five hundred pounds sterling, divorce is accessible only to a very limited class.<sup>1</sup>

In Scotland, adultery, even when committed by the husband, affords sufficient ground for divorce.<sup>2</sup> In this respect the law is yielding; but it has a rigorous side, for, while dissolving the union, it will not allow the guilty party to contract marriage with an accomplice in guilt.

In Sweden, divorce is permitted for adultery on either side; and this really comes to the same thing as permitting it by mutual consent, for the man has but to suffer himself to be accused of adultery, and dissolution takes place. In Denmark the same rule applies, unless collusion can be proved.

Under the Code Frederic, the parties may separate at will, and afterwards remarry; but this is only on condition of their continuing in a state of single blessedness for a whole year. It would seem that this interval—or, at any rate, some part of it—would have been better employed in delay before granting any divorce.

At Geneva, adultery afforded a sufficient ground; but a separation might also take place for mere incompatibility of temper. A woman, on quitting her husband's house and withdrawing to the society of her kinsmen or friends, thereby gave to the husband occasion for a petition of divorce, which, if presented, would be allowed in due course of law. Divorces were, however, rare: they were proclaimed in all the churches, and the proclamation acted as a sort of punishment or public censure which was always much dreaded.

<sup>1</sup> After the Reformation, when marriage ceased to be regarded by the Church as a sacrament, it was not held by the law to be indissoluble. But the first clear case of *dissolution* of the nuptial tie by Parliament (as distinguished from *annulment* of matrimony) was that of the Countess of Macclesfield in 1697. The power to pronounce decrees for dissolution remained vested in Parliament until 1857, when the Divorce Court was instituted, and jurisdiction in matrimonial matters was transferred from the Ecclesiastical Courts. (C. M. A.)

<sup>2</sup> Since the Reformation, no difference has existed between the sexes in Scotland. (C. M. A.)

In France, when marriage was made dissoluble at the will of the parties, it was found that, amongst married persons in Paris, there were between five and six hundred divorces within about two years. It is, however, very difficult to judge the effects of an institution during the period immediately following its adoption.

Divorce is infrequent in countries where it is permitted.

But divorces are by no means common in countries where they have been long allowed. The very reasons which have prevented legislators from permitting them deter private persons from availing themselves of any permission conceded by the legislature. The government which forbids them altogether has the effrontery to declare that it understands the interests of individuals better than they do themselves; and any prohibitory enactment has either a bad effect or none at all.

Limited divorce, or 'separation.'

The woman who has undergone cruelty and ill-usage at the hands of her husband may, in all civilized countries, obtain what is called a 'separation'; but this does not import permission to either party to marry again. The ascetic principle, a foe to every form of pleasure, has gone so far as to permit this alleviation of suffering; yet the outraged wife and her tyrant of a husband are placed exactly on the same footing as to re-marriage. Now, this apparent equality covers a very real inequality; for, while public opinion allows to the dominant sex a large measure of freedom in their sexual relations, it imposes on the weaker sex the most severe restraint.

### § 3. *On what Conditions?*

On what conditions should matrimony be entered into?

At this point we are only concerned to discover, under the guidance of Utility, what conditions of matrimony are best suited to the greatest number. It should be left to the parties interested to determine any special stipulations in the contract; in other words, the conditions should be dictated by their will and pleasure, subject, however, to certain general exceptions. Thus—

(a) FIRST CONDITION.—‘*The wife shall submit to the authority of her husband, saving recourse to the public tribunals.*’ Master of his wife in matters that concern himself, he should act as guardian of her special interests. The wills of two persons who pass their lives together may at any moment come in conflict. The interests of peace demand the establishment of a pre-eminence which shall prevent, or put an end to, any dispute. But why is power to be vested in the husband? Because he is the stronger. This rule will require no aid from outside to enforce it. Give control to the wife, and her husband would be in a condition of constant rebellion.

General  
Conditions.

Nor is this the only reason: it is probable that the man, by his mode of life, will have acquired more experience, more aptitude for business, more discernment of mind. In these regards there are exceptions; but we are concerned only with the general rule.

I have said, ‘saving recourse to the public tribunals’; for I have no mind to make man a tyrant, and to reduce to a state of submissive slavery the sex which, by reason of its frailty and gentleness, stands most in need of the law’s protection. The interests of womankind have been sacrificed but too often. The marriage laws of Rome were nothing more than a code of brute force, and the stronger took the lion’s share. But those who, under the influence of certain vague conceptions of justice and generosity, wish to bestow on women absolute equality, only spread for them a dangerous snare. To absolve them from the necessity of pleasing their husbands (so far as the laws could grant such absolution) would be to weaken, not to strengthen, their empire. Assured as he is of his prerogative, man’s vanity suffers no shocks; he even finds delight in an occasional act of voluntary submission. But—once substitute for the present relations a rivalry of powers—the pride of the stronger being constantly wounded, he would prove to the feebler partner a dangerous antagonist;



and, attaching more importance to what was taken away from him than to what was left, he would direct all his efforts to the re-establishment of his pre-eminence.

(β) SECOND CONDITION.—‘*The conduct of business matters and the control of property shall rest with the husband alone.*’ This is a direct and natural consequence of his position as predominant partner. Besides, the property is usually acquired through his exertions.

(γ) THIRD CONDITION.—‘*The right of enjoyment shall be common to the two parties.*’ The reason for this provision is the advantage arising from equality. It is well to give both parties the same degree of interest in the domestic prosperity; but this right is necessarily modified by the fundamental law which subjects the wife to the authority of her husband. Diversity of circumstances and differences in the nature of the property will involve legislative interference in many points of detail; but this is not the place to suggest the necessary adjustments.

(δ) FOURTH CONDITION.—‘*The wife shall observe conjugal fidelity.*’ I will not here set forth the grounds on which adultery should be reckoned an offence; they will be treated and developed in the Penal Code (*cf.* vol. ii., p. 154 *n.*).

(ε) FIFTH CONDITION.—‘*The husband shall, in like manner, observe conjugal fidelity.*’ The reasons for classing adultery on the part of the husband as a crime are not nearly so cogent, so that there ought to be considerable difference in the penalty exacted. But, still, they are strong enough to justify this general condition, and they, too, will be set forth in the Penal Code (*cf.* vol. ii., p. 154 *n.*).

#### § 4. *At what Age?*

At what age should matrimony be allowed?

It ought never to be allowed before the contracting parties are in a position thoroughly to appreciate the nature and extent of the engagement; and the inquiry becomes one of special gravity where the marriage is

At what  
age should  
marriages  
be allowed?

indissoluble. What precautions ought we not to take to prevent a rash alliance, when repentance would be all in vain! In such case, the right to enter into a matrimonial engagement should certainly not arise at a period earlier than that at which the individual is allowed to embark on the administration of his property. It is surely absurd that a man should be permitted to dispose of himself for life at an age when it is not lawful for him to sell a meadow worth ten crowns.<sup>1</sup>

### § 5. At whose Choice?

On whom should the choice of a husband or a wife depend? Marriage.  
At whose  
choice?

This question presents an apparent, if not a real, absurdity:—as if such a choice could possibly rest with any person other than the parties interested.

The laws should never entrust this function to fathers. Interference by  
parents. They lack two things essential to its beneficial exercise: the knowledge requisite for the choice, and a will directed to the true end. Fathers and children neither see nor feel in the same way: they have not the same interests. Love is the moving principle in youth: by the old, little regard is paid to it. With the children, fortune is usually a trifling consideration: with their fathers, it swallows up every other consideration. What the son wants is to be happy: what his father wishes is that he should appear to be so. The son is ready to sacrifice every interest to that of love, while his father would sacrifice that interest to every other.

It is, no doubt, exasperating enough for a father to be called upon to receive into his family a son-in-law or a daughter-in-law who is not at all to his taste; but is it not far harder for the child to be deprived of the spouse who would bring happiness and content? Can there be any

<sup>1</sup> The marriage of a boy under fourteen or girl under twelve was inchoate and imperfect. But if the parties were *habiles ad matrimonium* it was a good marriage whatever their age might be, in the sense that (if they agreed) at the age of consent they need not be married again.—*Coke on Litt.*, 79. And see vol. i., p. 307 n. (C. M. A.)

comparison between the ill consequences on one side and on the other? Contrast the probable duration of the father's life with that of the life of his child: and consider whether you ought to sacrifice the career which is just opening to that which is fast drawing to a close. So much for the mere *prevention* of marriage. What, then, shall be said if, under the father's mask, a pitiless tyrant is suffered to abuse the yielding timidity of his gentle daughter and force her to link her fate with that of a man whom she abhors?

We must, too, remember that the attachments of children depend largely on their fathers and their mothers. This is partly true of the sons, and wholly true of the daughters. If parents fail to exercise their rights, make no effort to direct the inclinations of their offspring, and leave to chance the choice of the children's acquaintance, will not the follies and imprudences of youth lie at the parents' door?

Finally it may be observed that, in taking away from parents the right to forbid or to constrain, there is no need to take away from them the right to moderate or retard. In the marriageable age two distinct periods occur. During the first, absence of consent on the part of the parents should suffice to annul the marriage; while during the second they should enjoy a right of retarding the celebration of the ceremony for some months. This delay should be allowed in order that the parents may further press their advice before the irrevocable step is taken.

In a certain European country renowned for the wisdom of its institutions, there prevails a very remarkable custom. The father's consent is necessary, in the case of minors, unless the lovers can cover a hundred leagues before they are overtaken. But if the runaway couple are lucky enough to reach a certain village,<sup>1</sup> and can get any person

<sup>1</sup> The village of Gretna Green, ten miles north-north-west from Carlisle, is over the border in Dumfriesshire. Many persons resorted thither after the abolition of Fleet marriages by Lord Hardwicke's Act in 1754, as that Act applied only to England. After 1856 a three weeks' residence in Scotland became necessary before the marriage could take place. (C. M. A.)

Parents'  
right to  
retard  
marriage.

'Gretna  
Green.'

they come across to pronounce, on the spot, a nuptial benediction, without any questions asked or answered, the marriage is quite valid and the veto of the father is frustrated. Is a privilege of this sort allowed to subsist for the encouragement of adventurers? Is it from some secret desire to weaken parental authority, or to favour what are called elsewhere *mésalliances*?<sup>1</sup>

### § 6. *How many Parties to the Contract.*

How many parties should be permitted to a contract of Polygamy. this nature, at one and the same time? In other words, ought polygamy to be tolerated? Now, polygamy is either simple or complex; and simple polygamy is either *Polygynia* (a multiplicity of wives) or *Polyandria* (a multiplicity of husbands).

Is polygynia useful or baneful? Anything that has ever Polygynia been said in its favour relates to certain special cases, to certain circumstances of a transitory character:—as where a man, through some ailment of his wife, is deprived of the sweets of marriage; or where the husband, owing to the exigences of his calling, is obliged to divide his time between two places of residence, as is the case with the skippers of certain trading vessels.

That polygynia would sometimes prove agreeable to the man seems likely enough; but it could never be so to the wives. For every man favoured by it, the interests of at least two women would be sacrificed.

(a) The effect of licence to contract such marriages Objections to polygynia. would be to aggravate the existing inequality in the conditions of mankind. Superiority of wealth already exerts a controlling influence which is too great, and such an institution would still further increase the influence. A

<sup>1</sup> In England, at this time, the marriage of an infant *by licence*, without the consent of the parent or guardian, was absolutely void. A marriage *by banns* might be good unless dissent was openly declared by the parent or guardian. And see now 4 Geo. IV., c. 76; 6 and 7 Will. IV., c. 85, s. 10. (C. M. A.)



Objections  
to poly-  
gynia—  
*contd.*

rich man, arranging an alliance with a penniless girl, would take advantage of her position so as to secure for himself the right of giving her a rival later on. Each of his wives would find herself reduced to the possession of a moiety of a husband; while, but for this iniquitous arrangement, she might have brought happiness to some other man, now perhaps bereft of a companion.

( $\beta$ ) What would become of the peace of families? The jealousies of rival wives would spread to their children, who would range themselves in opposite camps—small armies, with regents at their head of equal authority, at any rate in point of rights. What scenes of strife! What fury! What animosity! The relaxation of fraternal ties would result in a corresponding diminution of filial respect; for each son would behold in his father the protector of his enemy. Every action of the father, whether harsh or kindly, being interpreted by opposite prejudices, would be assigned to the promptings of unjust hate or of undue favour. Amidst these passionate conflicts, under a system of oppression or partiality, ruining some by its rigours while corrupting others by indulgence, the education of the young people would come to naught. Where the customs of the East prevail, polygamy and peace may exist together, but it is slavery which prevents discord; one abuse serves to palliate another, and under the same yoke there is a general tranquillity.

This institution would, moreover, result in an extension of the husband's authority. What eagerness to gratify him! What joy to anticipate a rival in some act which is like to give him pleasure! Now, would all this be mischievous or beneficial? Those who have a mean opinion of woman, and think that she cannot be too meek and submissive, ought to find polygamy admirable. Those who think that the controlling influence of the sex is favourable to refinement of manners—that it enhances the pleasures of association—that the mild rule and persuasive

powers of woman are salutary to the family—ought to consider such an institution most mischievous.

We need not seriously discuss either polyandria or complex polygamy. Perhaps too much has been said on the first branch of the subject; but it is well to expose the real foundations on which manners rest.

### § 7. *What Formalities should be observed?*

The formalities of the marriage contract should be directed to two objects: ( $\alpha$ ) To establish the fact of the free consent of the parties and of the lawfulness of their union; and ( $\beta$ ) to notify the marriage and to secure in the future ready proof of its celebration. It is, further, necessary to bring to the notice of the contracting parties the nature of the rights they are about to acquire, and of the correlative obligations under which they will lie by operation of law.

What Formalities should be observed in Matrimony?

Most nations have attached great solemnity to this function; and it is beyond doubt that ceremonies which strike the imagination serve to impress on the mind the dignity and importance of the contract.

In Scotland, the law, far too lax in this regard, requires no formality whatever. An interchange of declarations by the man and the woman, in the presence of a witness, will suffice to constitute a valid marriage. Hence it is to the Scotch frontier, where lies a certain village named Gretna Green,<sup>1</sup> that English minors, impatient of the parental yoke, repair to rid themselves of the restraint by a marriage celebrated out of hand.

In prescribing the necessary forms we must avoid two dangers: (i.) That of rendering them so intricate and cumbersome as to prevent a marriage, when neither freedom of consent nor full appreciation of the position is wanting; and (ii.) that of giving to the persons, who are

Dangers to be avoided

<sup>1</sup> Cf. note, § 5, *ante*, p. 306. (C. M. A.)

required to concur in the formalities, opportunity to abuse their privilege or to employ it for some sinister purpose. In several countries it is necessary to linger for a long and wearisome time in the vestibule of the temple before advancing to the altar. Under the designation of *fiancés*, men are trammelled by the fetters, without enjoying the advantages, of the contractual relation.

What purpose can this unmeaning prelude serve, save to multiply hindrances and to spread snares? The Code Frederic<sup>1</sup> is burdened with a vast number of useless restraints of this sort. English law, on the contrary, has, for once, chosen the path of clearness and simplicity; everyone knows how he stands, for he is either married or not married.

<sup>1</sup> Cf. note, 'Principles of Legislation,' chap. xiii., 6, *ante*, p. 93. (C. M. A.)



















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